United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

30-N

702

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23,118

SOUTH ATLANTIC & CARIBBEAN LINE INC.,
Petitioner

v.

FEDERAL MARITIME COMMISSION
and UNITED STATES OF AMERICA
Respondents

APPEAL FROM FINAL ORDER OF THE
FEDERAL MARITIME COMMISSION

APPENDIX

John Mason
Bradley R. Coury
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Washington, D. C. 20006
Attorneys for Petitioner

Washington, D. C. - THIEL PRESS - 202 - 393-0625

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EXHIBIT B

(S E R V E D)
(APRIL 4, 1969
(FEDERAL MARITIME COMMISSION

FEDERAL MARITIME COMMISSION

DOCKET NO. 69-9

SOUTH ATLANTIC AND CARIBBEAN LINE, INC.-
ORDER TO SHOW CAUSE

Attempted embargo of South Atlantic and Caribbean Line, Inc. unlawful because not due to an inability to carry. Order to cease and desist issued.

John Mason for Respondent South Atlantic and Caribbean Line, Inc.
Herbert Burstein for Intervenors Transconex, Inc., and United Freightways Corp.
Robert N. Karasch for Intervenor Puerto Rican Forwarding Co., Inc.
Richard S. Harsh and Donald J. Brunner as Hearing Counsel.

REPORT

BY THE COMMISSION: (John Harllee, Chairman; James V. Day, Vice Chairman; Ashton C. Barrett, George H. Hearn, and James F. Fanseen, Commissioners.)

This proceeding concerns the validity under section 2 of the Intercoastal Shipping Act, 1933 (46 U.S.C. 844) of an "embargo" imposed by South Atlantic and Caribbean Line, Inc. (SACL).

SACL is a common carrier by water serving, among others, the trade between Miami, Florida and San Juan, Puerto Rico. As required by section 2 of the Intercoastal Act, SACL files its rates, fares, and charges for this service with the Commission. These tariffs provide a so-called freight-all-kinds (FAK) rate. Under this rate SACL spots an empty highway trailer (also known as a container) at a shipper's premises within the limits of greater Miami. 1/ After the shipper loads the trailer, SACL picks it up and hauls it to the marine terminal for loading aboard a vessel for carriage to San Juan. SACL's rates for this service are $700 for a 35-foot trailer and $800 for a 40-foot trailer.

1/ The limits are set forth in SACL's tariffs.

Intervenors Transconex, Inc., United Freightways Corporation, and Puerto Rican Forwarding Co., Inc., are nonvessel operating common carriers (NVO) by water within the meaning of the decision in Docket 815 - Determination of Common Carrier Status, 6 F.M.B. 245, 287 (1961). As such they hold
2 themselves out to the general public to transport general commodities in Miami-San Juan trade by tariffs filed with the Commission. Under these tariffs, intervenors consolidate less-than-trailerload shipments into full trailerloads and tender them to SACL for transportation at the FAK rates.

On February 19, 1969, the International Longshoremen's Association (ILA) and the employers of longshoremen at the port of Miami entered into a "Deepsea Longshore Agreement", the provisions of which were made retroactive to October 1, 1968. Clause 19 of this agreement provides in part:

Containerization

> (a) Containers owned or leased by employer-members (including containers on wheels) containing LTL loads or consolidated full-container loads which are destined for or come from, any person (including a consolidator who stuffs containers of outbound cargo or a distributor who strips containers of inbound cargo) who is not the beneficial owner of the cargo, and which either comes from or is destined to any point within a 50-mile radius from the center of any ports covered by this agreement shall be stuffed and stripped by ILA labor at longshore rates on a waterfront facility.

Clause 19 also contains a series of rules which like the quoted portion above "are designed to protect and preserve the work jurisdiction of longshoremen and all other ILA crafts at deepsea piers and terminals." Under these rules, any container which meets the criteria of Clause 19 may upon its arrival at SACL's terminal facilities be unloaded (stripped) and reloaded (stuffed) by ILA labor. However, if "for any reason" a container is no longer at the waterfront facility where it should have been "stuffed or stripped" by ILA labor, then "the steamship carrier shall pay to the joint Welfare Fund liquidated damages of $250 per container which should have been stuffed or stripped."

SACL does not itself employ longshore labor at Miami and is not a party to the February 19th agreement. SACL's stevedoring at Miami is performed by Eagle, Inc. an unrelated company who presumably is a party to the agreement. In any event, SACL views Clause 19 as a "lawful limitation upon the transportation service which SACL, as a common carrier by water, can perform at the Port of Miami."

3 On March 6, 1969, SACL published its "Embargo Notice" which stated that effective immediately SACL would no longer book or accept for loading aboard or discharge from its ships at Miami any container which (a) contains LTL loads or consolidated full container loads, and (b) comes from or is destined to any point within a 50-mile radius from the center of Miami. As originally published, the notice contained a "proviso" under which SACL would transport such cargo if (a) the ILA agreed to handle the container without unloading and reloading, and (b) the shipper would sign a statement agreeing to indemnify SACL in the amount of $250 per container in the event the ILA invoked the liquidated damages provision of Clause 19. The proviso was deleted after the Commission's Bureau of Domestic Regulation expressed concern over the validity of the indemnification requirement.[2/] As it now stands, SACL's "Embargo Notice" constitutes an absolute refusal to carry "Clause 19 cargo." The intervenor's containers are among those "embargoed" by SACL. No NVO containers would be accepted under the present "Embargo Notice."

SACL itself candidly admits that if the ILA does not insist upon its "right" to unload and reload NVO containers at the SACL terminal, it is physically capable of handling the traffic. Intervenors just as readily admit that if the ILA does insist upon unloading and reloading their containers, SACL s facilities would not be adequate. In other words,

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2/ The indemnity provision would presumably have constituted a condition of carriage not set forth in SACL's tariffs.

congestion is not a problem unless the ILA insists upon unloading and reloading the NVO trailers. As yet the ILA has not invoked Clause 19 and SACL has carried some NVO containers since the longshore agreement became effective.

Discussion and Conclusions

The only question presented is whether SACL's "Embargo Notice" imposed a true embargo. If it did the filing and notice requirements of section 2 of the Intercoastal Act 3/ do not apply and the Notice is valid.

A common carrier by water subject to the provisions of the Intercoastal Act has a duty and obligation to accept and carry all cargo tendered to it in accordance with the terms and conditions of its published and filed tariffs. Order That A.H. Bull SS. Co. Show Cause, 7 F.M.C. 133 (1962). It is equally clear that any alterations in those terms and conditions must be published and filed to be effective 30 days from the date of filing and publication, or the subject of a special permission granted under section 2 of the Intercoastal Shipping Act. Historically, however, certain occurrences such as the intervention of acts of God or the common enemy, or congestion at a carrier's terminal facilities such that it is physically incapable of handling the traffic, have relieved the carrier from the obligation to carry for all indiscriminately. Galveston Truck Line, Corp. v. Ada Motor Lines, Inc., 73 M.C.C. 617 (1957); Boston Wool Trade Assoc. v. Merchants

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3/ The relevant part of section 2 provides:

> No change shall be made in the rates, fares, or charges, or classifications, rules, or regulations, which have been filed and posted as required by this section, except by the publication, filing, and posting as aforesaid of a new schedule or schedules which shall become effective not earlier than thirty days after date of postponing and filing thereof with the Board, and such schedule or schedules shall plainly show the changes proposed to be made in the schedule or schedules then in force and the time when the rates, fares, charges, classifications, rules, or regulations as changed are to become effective: Provided, That the Board may, in its discretion and for good cause, allow changes upon less than the period of thirty days herein specified: . . . .

and Miners Transp. Co., 1 U.S.S.B. 32 (1921). Financial loss on the carriage does not normally, without more, constitute sufficient justification for the imposition of an embargo. A.H. Bull, supra.[4] There must be a physical disability to carry.

SACL, by its own admission, is under no existing physical disability to carry the cargo in question and, unless there is some other good and sufficient reason for imposing the "embargo", it is unlawful and a cease and desist order should be issued.

5 SACL contends that any such cease and desist order would, rather than remove a violation of section 2 of the Intercoastal Act, create a new violation because SACL would then be compelled to perform "a substantial additional terminal service" for which there is no provision in its tariff. This, it is contended, would be in violation of that part of section 2 which provides that tariffs:

> . . . shall also state separately each terminal or other charge, privilege, or facility, granted or allowed, and any rules, or regulations which in anywise change, affect or determine any part of the aggregate of such aforesaid rates, or the value of the service rendered . . . .

In SACL's view, since its tariffs do not provide for the unloading and reloading of NVO trailers, it would be unlawful for them to perform this "service" under its existing tariff. Thus, should we order SACL to lift its embargo, we would in effect be directing a violation of section 2. There is in this contention a basic flaw which inheres in virtually every argument made by SACL in support of its "Embargo Notice."

As SACL itself says, it does not want to perform this "additional terminal service." It is not something "offered" by SACL to the shipping

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4/ At one point SACL offers an "unrecoverable financial loss" as justification. It attempts to distinguish the Bull case on the grounds that in that case there was involved a financial loss incurred in providing an already existing service while here the loss would be incurred in providing a "new service", i.e., unloading and reloading NVO trailers. We find this distinction irrelevant and without merit.

public as an aid to efficient transportation of goods. If it can be characterized as anything from SACL's point of view, it is a penalty for handling NVO trailers. It is the result of a labor dispute and arises from a collective bargaining agreement to which SACL is not a party. While it may be true that ultimately SACL might have to alter the terms and conditions under which it will hold itself out to transport NVO trailers, it may do so only in the manner prescribed by law - the manner clearly prescribed by section 2 of the Intercoastal Shipping Act. Until this is done, SACL must accept and carry all cargo tendered to it under the terms and conditions of its existing tariffs. We are not here concerned with the ultimate validity of Clause 19. Such a determination is beyond our jurisdiction and is within the province of the National Labor Relations Board. But whatever its validity, we cannot permit the mere execution of a collective bargaining agreement to override the clear requirements of a statute we are charged to administer.
6 Statutes controlling the activities of common carriers and the obligations of those carriers are not subordinate to the requirements of labor contracts. Galveston Truck Line Corp. v. Ada Motor Lines, Inc., supra, at 627.

We are not without sympathy for the position in which SACL finds itself, but it is of course not an excuse for the imposition of an unlawful embargo. Other avenues were open, not the least of which was the application for special permission for a short notice filing to amend SACL's tariffs. Thus, until SACL's tariffs are properly amended, it must accept the NVO trailers under the existing terms and conditions set forth therein. 5/ This disposes of yet another argument of SACL's - that the shipper has failed in his duty "to tender the merchandise in good order and condition for shipment",

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5/ This conclusion does not, of course, compel SACL to provide service in the "certificate of convenience and necessity" sense. We are merely requiring that SACL fulfill its common carrier obligation in accordance with its own tariffs. Our decision here does not go to any amendments to those tariffs which SACL may file in the future.

thereby relieving SACL of the obligation to transport it. It is sufficient here to say that SACL's tariff has no provision that it will accept only trailers stuffed or stripped by ILA labor; therefore, any such condition is invalidly imposed. 6/

Finally, and in yet another attempt to distinguish the Bull case, supra, SACL argues that our decision in that case rested upon insufficient authority. It is SACL's position that our decision in that case necessarily rested upon the authority to compel a carrier subject to our jurisdiction to continue providing service. Without resort to a full discussion of the flaws involved in SACL's reasoning, we think it sufficient to point out that in our decision in the Bull case we expressly denied resort to that authority - an authority which we admittedly do not have.

7 If we have not dealt at length with each and every argument proferred by SACL, it is not because we have not considered them. Rather, they are all disposed of by the overriding principle that SACL is bound to perform the service it holds itself out to perform in its published tariff unless and until those tariffs are amended in the manner prescribed by section 2 of the Intercoastal Act.

In summary, SACL by its own admission, is capable of carrying the cargo here at issue as circumstances now stand. Since there is no physical disability to carry the embargo is unlawfully imposed and a cease and desist order will issue. Our decision here does not reach either the validity of the collective bargaining agreement and Clause 19 or the

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6/ The principle that SACL must transport cargo in accordance with its present tariffs and what we have said concerning SACL's obligations vis-a-vis the demands of the ILA also disposes of the arguments of SACL that to handle the NVO containers would be to grant them an undue advantage over other traffic carried by SACL. Moreover, it is an extremely dubious advantage to unload an already properly loaded trailer and reload it. In fact it is more in the nature of a disadvantage.

question of what actions by SACL would be proper should the ILA insist on invoking Clause 19. We think it worth repeating, however, that SACL has open to it the filing of an application for special permission under Rule 14 of Tariff Circular No. 3, and that any such application would of course receive prompt consideration. By this we do not mean to be instructing SACL or any other party in a particular course of action. Parties on both sides of the issue stated at oral argument that they thought this dispute should have been settled by the parties without resort to this Commission. We agree; and we leave it to the parties to devise a mutually agreeable settlement.

The Commission is well aware that many problems have suddenly arisen, and more are likely to emerge, for various shipping interests as a result of the new longshore contract. Although the Commission cannot deal with the new labor contract which is the immediate source of this condition, we can deal with those persons affected by it and within our jurisdiction. In that posture we do not intend to permit disruptions of our waterborne foreign or domestic offshore commerce. Again, we will not impose solutions on the parties herein; but we will be receptive to solutions presented to us which are lawful and consistent with just consideration of all interests and the public weal.

8 We would have accepted, on application for short notice filing, the indemnification provision as originally utilized by SACL. Now we would accept any appropriate tariff filing on short notice, the result of which would be to make the carrier whole in the event Clause 19 is invoked and which would enable the cargo to move.

Thomas Lisi
Secretary

(SEAL)

EXHIBIT C

(S E R V E D)
(APRIL 4, 1969)
FEDERAL MARITIME COMMISSION (FEDERAL MARITIME COMMISSION)

DOCKET NO. 69-9

SOUTH ATLANTIC AND CARIBBEAN LINE, INC. -
ORDER TO SHOW CAUSE

ORDER

The Federal Maritime Commission instituted this proceeding to determine the validity under section 2 of the Intercoastal Shipping Act, 1933 (46 U.S.C. 844) of an "embargo" imposed by South Atlantic and Caribbean Line, Inc., and the Commission having this date made and entered its report stating its findings and conclusions, which report is made a part hereof by reference:

THEREFORE, IT IS ORDERED, That South Atlantic and Caribbean Line, Inc. cease and desist from enforcing its "Embargo Notice" dated March 6, 1969.

By the Commission.

Thomas Lisi

Thomas Lisi
Secretary

(SEAL)

- EMBARGO NOTICE - EXHIBIT NO. 1

SOUTH ATLANTIC AND CARIBBEAN LINE, INC. FMC - F NO. 6 and 7

Freight Tariff No. 6 and 7 Page No. 1

THE EMBARGO WILL APPLY, AS INDICATED, TO:

1) SOUTH ATLANTIC & CARIBBEAN LINE, INC., Freight Tariff No. 6, FMC-F No. 6, insofaras it names rates and charges on commodities from the commonwealth of Puerto Rico to Miami, Florida.

2) SOUTH ATLANTIC & CARIBBEAN LINE, INC., Freight Tariff No. 7, FMC-F No. 7, insofaras it names rates and charges on commodities from Miami, Florida to the commonwealth of Puerto Rico.

EMBARGO NOTICE

WHEREAS, by Collective Bargaining Agreement dated 19 February 1969 (Deepsea Longshore Agreement), effective from 10:01 a.m., October 1, 1968, it is provided that certain consolidated LTL or full container loads hereafter more fully described must be unloaded and reloaded at a water-front facility in the Port of Miami under the terms and conditions of said Collective Bargaining Agreement or, if not so unloaded and reloaded, be subject to liquidated damages payable to the Welfare Fund of the International Longshoreman's Association in the amount of $250 per container; and,

WHEREAS, the unloading and reloading of such containers at SACAL's water-front facilities in Miami, will produce terminal congestion, interfering with and delaying the receipt, handling and loading and the unloading, handling and delivery of all cargo, including such containers, at such terminal; and,

WHEREAS, the unloading and reloading of such containers will subject SACAL to additional legal liabilities in respect of the care and custody of such re-handled cargo, as well as to added expense,

NOW THEREFORE,

1. Effective immediately, South Atlantic & Caribbean Line, Inc., will not book or accept for loading aboard or discharge from their ships at Miami any container which

(a) contains LTL loads or consolidated full container loads; and,

(b) comes from or goes to any person (including a consolidator who loads containers of outbound cargo or a distributor who unloads containers of inbound cargo), who is either a consolidator of an outbound cargo or a distributor of inbound cargo who is not the beneficial owner of the cargo; and,

(c) comes from or goes to any point within a geographical area described by a 50-mile circle with its radius extending, respectively, from the center of Miami, Florida.

2. PROVIDED, that such consolidated trailers will be booked and accepted for loading without unloading and reloading at SACAL's terminals in any case where (a) the International Longshoreman's Association so agrees and (b) the consolidator shipper or the distributor consignee of any such container executes and delivers to SACAL at the time of the booking or at the time of delivery an idemnity in the following form:-

(Continued on Page 2.)

ISSUED: MARCH 6, 1969 EFFECTIVE: MARCH 6, 1969

ISSUED BY:
R. W. HAMMEL, General Freight Agent
808 N.E. Second Avenue
Miami, Florida
33132

- EMBARGO NOTICE - EXHIBIT NO. 1 Page 2

SOUTH ATLANTIC AND CARIBBEAN LINE, INC. FMC - F NO. 6 and 7

Freight Tarif No. 6 and 7 Page No. 2

EMBARGO NOTICE (Continued from Page 1)

"In consideration of South Atlantic & Caribbean Line, Inc. (SACAL), accepting for loading aboard their MV scheduled to sail on , trailer number containing consolidated or less than truck load shipments, without unloading and reloading the said trailer at SACAL's terminal as required by the Deepsea Longshore Agreement of 19th February, 1969, the undersigned hereby agree to indemnify SACAL for the payment by SACAL (or their contractors) of the liquidated damages in the amount of $250 per trailer provided in the said agreement, when and as liquidated damages are in fact paid."

ISSUED: MARCH 6, 1969 EFFECTIVE: MARCH 6, 1969

ISSUED BY:
R.W. HAMMEL, General Freight Agent
808 N.E. Second Avenue
Miami, Florida
33132

EXHIBIT NO. 2

COPY - Telegram

SOUTH ATLANTIC & CARIBBEAN LINES
808 N. W. 2nd Avenue
Miami, Florida

WE HAVE INFORMATION THAT SACAL IS REQUIRING SHIPPERS OF CONSOLIDATED CONTAINER LOADS TO AGREE TO INDEMNIFY SACAL FOR ANY PENALTY AGAINST SACAL BY THE ILA PURSUANT TO NEW LABOR AGREEMENT. SECTION 2 INTERCOASTAL SHIPPING ACT 1933 REQUIRES THAT ANY RULES OR REGULATIONS WHICH IN ANYWISE CHANGE, EFFECT OR DETERMINE ANY PART OF A CARRIER 'S RATES OR CHARGES SHALL BE CLEARLY STATED AND PUBLISHED IN ITS TARIFF. SINCE SACAL HAS NO PROVISION IN ITS TARIFF PROVIDING FOR RECEIVING AN INDEMNIFICATION CONTRACT AS A CONDITION OF CARRIAGE, REQUIRING SUCH CONDITION APPEARS TO BE IN VIOLATION OF SECTION 2. IMMEDIATE STEPS SHOULD BE TAKEN TO SEE THAT SUCH UNPUBLISHED CONDITIONS ARE NOT IMPOSED. PLEASE ADVISE CORRECTIVE ACTION YOU PROPOSE TO TAKE.

LEROY F. FULLER
BUREAU OF DOMESTIC REGULATION
FEDERAL MARITIME COMMISSION

MARCH 5, 1969 ---- 5 p.m.

- AMENDMENT TO EMBARGO NOTICE - EXHIBIT NO. 3

SOUTH ATLANTIC AND CARIBBEAN LINE, INC. FMC - F NO. 6 and 7

Freight Tariff No. 6 and 7 Page No. 1

THE EMBARGO WILL APPLY, AS INDICATED, TO:

1) SOUTH ATLANTIC & CARIBBEAN LINE, INC. Freight Tariff No. 6, FMC-F No. 6, insofaras it names rates and charges on commodities from the commonwealth of Puerto Rico and Miami, Florida.

2) SOUTH ATLANTIC & CARBBEAN LINE, INC., Freight Tariff No. 7, FMC-F No. 7, insofaras it names rates and charges on commodities from Miami, Florida to the commonwealth of Puerto Rico.

AMENDMENT NO. 1 to EMBARGO NOTICE

Upon the telegraphic advice of the Bureau of Domestic Regulation, Federal Maritime Commission, that the indemnity provided for in Paragraph two (2) of our Embargo notice of this date may be in violation of Section 2 of the Intercoastal Shipping Act, 1933, the said Paragraph two (2) is hereby revoked. The Embargo notice of this date remains in full force and affect in every other respect.

ISSUED: MARCH 6, 1969 EFFECTIVE: MARCH 6, 1969

ISSUED BY:
R. W. HAMMEL, General Freight Agent
808 N. E. Second Avenue
Miami, Florida
33132

EXHIBIT NO. 4

FEDERAL MARITIME COMMISSION
WASHINGTON, D.C. 20573

IN REPLY REFER TO:
WRP:42

March 7, 1969

Mr. R. W. Hammel
General Freight Agent
South Atlantic & Caribbean Lines, Inc.
808 N. E. 2nd Avenue
Miami, Florida 33132

Dear Mr. Hammel:

On March 6, 1969 the Federal Maritime Commission received your publication entitled "Embargo Notice" together with an amendment thereto which by its terms became effective at 12:01 A. M., March 6, 1969.

The Intercoastal Shipping Act, 1933 and Rule 13(a) of Domestic Tariff Circular No. 3 requires common carriers by water to publish tariff matters on not less than 30 days' notice. Insofar as this so-called "Embargo Notice" and the amendment purport to be a filing to amend Tariffs FMC-F Nos. 6 and 7, it was submitted in a manner not permitted by the Tariff Circular and the Intercoastal Shipping Act, and it is hereby rejected.

Very truly yours,

Leroy F. Fuller

Leroy F. Fuller, Director
Bureau of Domestic Regulation

cc: Mr. John Mason
Ragan & Mason
The Farragut Building
900 Seventeenth St., N. W.
Washington, D. C.

International Tariff Services, Inc.
505 Landmark Building
Wasshington, D. C. 20005

FEDERAL MARITIME COMMISSION

Docket No. 69-9

SOUTH ATLANTIC AND CARIBBEAN LINES, INC.

ORDER TO SHOW CAUSE

On March 6, 1969, the South Atlantic and Caribbean Lines, Inc., a common carrier by water engaged in the carriage of goods between the Commonwealth of Puerto Rico and Miami, Florida, published a notice entitled "Embargo Notice" together with an amendment wherein said carrier advised that effective March 6, 1969 it would no longer book or accept for loading aboard or discharge from their ships at Miami any container which (a) contains LTL loads or consolidated full container loads; and, (b) comes from or goes to any person (including a consolidator who loads containers of outbound cargo or a distributor who unloads containers of inbound cargo), who is either a consolidator of outbound cargo or a distributor of inbound cargo who is not the beneficial owner of the cargo; and, (c) comes from or goes to any point within a geographical area described by a 50-mile circle with its radius extending, respectively, from the center of Miami, Florida. It appears that such "embargo" is now being enforced by the carrier.

There further appears to be no evidence of any emergency condition or physical limitations of said carrier necessitating the imposition of an embargo; and South Atlantic & Caribbean Lines, Inc.

has on file with the Federal Maritime Commission a schedule of freight rates which apply to LTL loads or consolidated full containers of consolidators and/or distributors who are not the beneficial owners of such cargo; and which come from or go to points within a geographical area described by a 50-mile circle with its radius extending, respectively, from the center of Miami, Florida./

Section 2 of the Intercoastal Shipping Act, 1933, and Federal Maritime Commission Tariff Circular No. 3, as amended, require a carrier to file with this Commission a new schedule or schedules to become effective not earlier than 30 days after date of filing, before any change shall be made in the rates, fares, charges, classifications, rules, or regulations that have previously been filed with the Commission.

Now, therefore, it is ordered, pursuant to Section 2 of the Intercoastal Shipping Act, 1933 and Section 22 of the Shipping Act, 1916, that South Atlantic & Caribbean Lines, Inc. show cause on or before March 13, 1969, why it should not be ordered to cease and desist from carrying out the aforementioned embargo, and the proceeding shall be confined solely to such issue.

It is further ordered, that this order be published in the Federal Register and served on South Atlantic and Caribbean Line, Inc., who is named as respondent in this proceeding. Oral argument in this proceeding will be heard by the Commission on March 13, 1969, in Room 1215, 1405 I Street, N.W., Washington, D.C., at 2:00 p.m., Eastern Standard Time. Notwithstanding the rules as to time and service of documents of this Commission's Rules of Practice and Procedure, the parties to this proceeding shall adhere to the following schedule: Affidavits of fact

and memoranda of law may be submitted to the Commission on or before the close of business, March 11, 1969. All persons having an interest in this proceeding, desiring to intervene therein, should notify the Secretary of the Commission promptly and may file petitions for leave to intervene together with affidavits of fact and memoranda of law in accordance with the schedule set forth herein. All documents or pleadings filed in this proceeding including petitions to intervene must be served by the person filing same upon all parties of record. The parties to this proceeding will be notified by the Secretary of the time allotted for oral argument.

By the Commission.

Thomas Lisi
Secretary

(SEAL)

RESPONDENT

SOUTH ATLANTIC AND CARIBBEAN LINES, INC.
c/o JOHN MASON, ESQ.
RAGAN & MASON
900 - 17th Street, N.W.
Washington, D.C. 20006

BEFORE THE FEDERAL MARITIME COMMISSION

- -x

SOUTH ATLANTIC AND CARIBBEAN LINES, INC. :
Docket No. 69-9
Order to Show Cause :

- -x

VERIFIED STATEMENT OF TRANSCONEX, INC. IN SUPPORT OF THE COMMISSION'S ORDER TO SHOW CAUSE

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

ROY M. JACOBS, being duly sworn, deposes and says:

1. I am the Vice President of Transconex, Inc. ("Transconex"). Transconex maintains offices at 990 Southeast 11th Street, Hialeah, Florida, and at Vernon Road, Jacksonville, Florida.

2. Transconex is a non-vessel operating common carrier ("NVOCC") engaged in the transportation of general commodities between Miami and Jacksonville, Florida, on the one hand, and Puerto Rico, on the other. As an NVOCC and under the provisions of the tariffs on file with the Federal Maritime Commission ("Commission"), Transconex consolidates less-than-trailer load shipments in Hialeah and Jacksonville into trailers and tenders

them to South Atlantic & Caribbean Lines, Inc. ("SACAL") for transportation to Puerto Rico. At Puerto Rico, Transconex strips the trailers and arranges for delivery of the shipments to the various consignees.

Transconex has been engaged in business since 1967 and has employed SACAL as the ocean carrier since that date. At times, Transconex engaged Sea-Land Service, Inc. ("Sea-Land") out of Jacksonville. However, all shipments moving through the port of Miami are handled by SACAL; eighty (80%) per cent of shipments moving through the port of Jacksonville are handled by SACAL; and approximately twenty (20%) per cent are serviced by Sea-Land.

3. The trailers tendered by Transconex are handled by SACAL pursuant to its Tariff FMC-F No. 7 on file with the Commission, and SACAL assesses a rate for Freight All Kinds of $700 for a 35 foot trailer with a maximum load of 40,000 pounds; and for a 40 foot trailer a rate of $800 with a maximum load of 45,000 pounds. [SACAL Tariff FMC-F No. 7, Southbound Freight Tariff No. 7 at 10th revised page 8.]

4. During the course of the strike by the International Longshoremen's Association ("ILA") SACAL advised Transconex that it could arrange for the movement of 7 trailer loads from Jacksonville, Florida to Puerto Rico. These trailers were loaded in Miami and arrangements were made to move them from Miami to Jacksonville, Florida. The trailers were to sail on January 22, 1969. However, SACAL could not arrange for any sailing, and these trailers remained at Jacksonville until the conclusion of the strike.

5. The strike by the ILA ended on February 15, 1969, at New York, New York, and on February 20, 1969, at the Port of Miami. On February 21, 1969, SACAL called a meeting of Transconex and other NVOCCS operating in Miami. At that time, SACAL advised that each NVOCC would be required to sign a letter of indemnification for any loaded trailers handled by SACAL for an NVOCC. A copy of the said letter of indemnification is annexed hereto as Exhibit "A" and made part hereof.

Transconex signed this letter of indemnification and SACAL proceeded to handle two trailers on the "S. S. Borincano" which sailed on ~~about~~ [illegible], 1969. Clearly, the $250 indemnification was demanded by SACAL in the event it became due to the Longshoremen under the collective bargaining agreement which had been negotiated, if the trailers had not been loaded by members of the Longshoremen.

6. On or about February 26, 1969, SACAL arranged for its vessel, the S. C. Floridian to leave Jacksonville empty and sail to Miami so that all loaded trailers backed up during the strike at Miami could be loaded upon the Floridian for delivery to Puerto Rico. The S. S. Floridian was to sail from Miami on March 1, 1969. At that time, SACAL's S. S. Borincano was returning to Miami and it was intended that it would sail from Miami on March 2, 1969. Transconex had reserved space for its loaded trailers on both of these vessels. On February 28, 1969, our office was advised by SACAL that it could handle the 7 trailer loads for which we had reserved space and solicited additional traffic because all of the space on the vessels had

not been reserved and the vessels could handle additional trailer loads that were available. All of the backlog resulting from the strike had been cleared up. We thereupon reserved space for three additional trailer loads. We proceeded to sign the letter of indemnification for each of the 10 trailer loads. These trailer loads were, in fact, handled by SACAL and delivered to Puerto Rico.

7. Thereafter and on March 3, 1969, Transconex booked space for 10 trailer loads for the S. S. Floridian on March 9, 1969. On March 4, 1969, SACAL delivered one empty trailer to us for loading for the March 9, 1969 sailing. On March 4, 1969, your deponent met with a representative of SACAL and advised him that Transconex could no longer sign any letter of indemnification since it was not provided for in SACAL's tariff and, furthermore, if SACAL sought to enforce the letter of indemnification, Transconex could not recoup any additional cost from its customers since it had no provision in its tariff for such charges. At that point, the representative of SACAL advised that no further equipment would be made available to

Transconex unless the letter of indemnification was signed prior to the delivery of the equipment to Transconex, even though Transconex had already booked and reserved space for 10 trailers for the sailing on March 9, 1969. Thereupon, Transconex, through its attorneys, filed a protest with the Commission, which was received by the Commission on March 5, 1969. Upon information and belief, the Commission then communicated with SACAL and advised SACAL that its actions were unlawful, in violation of the law and constituted a breach of duty as a common carrier.

However, in view of the fact that Transconex had on hand freight from its customers which it had undertaken to arrange to transport to Puerto Rico and being exposed to actions for damages, agreed again to sign the letter of indemnification. Transconex requested SACAL to make available to it 5 additional trailers and signed the letter of indemnification for the 6 trailers. Shortly, thereafter, on March 5, 1969, after signing the letter of indemnification, one empty trailer was delivered by SACAL.

8. Apparently, on March 5, 1969, SACAL had already prepared its purported "embargo notice" against NVOCC traffic under heading of South Atlantic & Caribbean Lines, Inc., FMC-F No. 6 and No. 7 Freight Tariff No. 6 and No. 7 to be issued March 6, 1969, to be effective March 6, 1969. Upon information and belief, the purported embargo notice was filed with the Commission on the morning of March 6, 1969. On March 6, 1969, another empty trailer was delivered by SACAL to Transconex but at 12 noon that day, SACAL advised Transconex not to load the trailer because it would not be handled by SACAL. However, Transconex had already loaded the trailer. Later in the day, namely, on March 6, 1969, SACAL issued an amendment to the alleged embargo notice which it had filed. Thereafter and on March 7, 1969, the Commission by letter dated March 7, 1969, advised that the purported embargo notice was rejected on the ground that insofar as they purported to be amendments to the existing tariffs of SACAL, they had not been published as required by law. On March 7, 1969, Transconex received the telegram from SACAL annexed hereto as Exhibit "B".

9. The trailers that had been loaded by Transconex had been picked up by SACAL but they did not sail on the scheduled sailing of S. S. Floridian of March 9, 1969. To date, SACAL has refused to deliver even the three additional empty trailers for which letters of indemnification have been signed by Transconex.

10. It is perfectly clear that the purported embargo notice is, in effect, an amendment to the existing tariff of SACAL. That there is no congestion at the piers in Miami for the handling of NVOCC trailers is obvious, since SACAL was looking for additional traffic from Transconex for the March 1 and 2, 1969 sailings.

The contention that there is congestion at the piers in Miami and that the handling of NVOCC trailers would further interfere with the handling of freight is nothing more than a pretext, for the imposition of the $250 penalty provided for in the letter of indemnification in the absence of appropriate tariff filings. To begin with, SACAL is not equipped to handle LTL freight. LTL freight has always been handled through NVOCCS. SACAL does

not have the terminal facilities to consolidate at its premises small shipments into trailerloads.

That this is a device is made self-evident by the fact that the embargo notice, as initially published, on the one hand, states that the embargo is required because of congestion; and on the other SACAL will handle the cargo of NVOCCS if the letter of indemnification is signed. The amendment to the embargo notice does not cure the basic defect that this is nothing but an attempt of SACAL to amend its tariff.

11. Transconex tenders to SACAL approximately 1,000 trailers per year. It transacts approximately $1,000,000 worth of business with SACAL annually. The only business of Transconex is that of a NVOCC, and if SACAL refuses to handle trailers loaded by Transconex, Transconex will be forced out of business. There are no other steamship companies available to handle this traffic except Sea-Land and then only to a minor extent, from Jacksonville.

12. If Transconex is forced to go out of business as a result of the unlawful conduct of SACAL, 50 employees will be discharged. Over the two-year period that Transconex has been in business, it has made a capital investment of approximately $100,000 which will be lost. This does not, of course, take into account the efforts and time of the principals to create a going concern. Additionally, Transconex is exposed to numerous lawsuits from its customers for freight on hand, for which it cannot arrange transportation to Puerto Rico. It is no answer that Transconex can pass any charges onto their customers since this will result in the diversion of traffic to other modes of transportation, particularly air. Furthermore, Transconex cannot increase its rates except by appropriate tariff filings, which, upon information and belief, will be contested before the Commision. There is no question but that Transconex will sustain irreparable harm and damage if SACAL's unlawful conduct is permitted to continue.

13. It is respectfully submitted that SACAL has apparently agreed to assume additional costs and expense in handling NVOCC trailers under the agreement negotiated with the ILA. Irrespective of an ultimate decision either by the Commission or the Courts as the legality of the agreement with the ILA, SACAL cannot, through the guise of an embargo, increase its rates for handling NVOCC trailers without following established tariff procedures mandated by law. The facts convincingly show that if NVOCCS sign the letter of indemnification providing for the additional charge, then alleged physical congestion would no longer be a bar to the handling of the traffic. The Commission should reject the purported embargo and issue an order directing SACAL to handle NVOCC traffic without any requirement for a letter of indemnification.

The instant proceeding falls squarely within the Commission's decision in A. H. Bull Steamship Co., 7 F.M.C. 133, where the Commission, in rejecting a proposed embargo, held as follows:

"As pointed out in the Boston Wool Trade case, supra, an embargo 'is an emergency measure to be resorted to only where there is a congestion of traffic, or when it is impossible to transport the freight offered because of physical limitations of the carrier.' (1 U.S.S.B. at page 33.) See also, New York Central Railroad Company v. United States, 201 F. Supp. 958 (USDC, S.D.N.Y. 1962) and cases cited therein. There is no evidence in the record that Bull is unable to perform the carriage in question because of physical limitations. The only reason proffered by Bull for its cessation of service is that of financial loss. Generally speaking financial loss is not justification for the imposition of an embargo. New Orleans Traffic & Transp. Bureau v. Mississippi Valley Barge Line Co. 280 I.C.C. 105 (1951); New York Central R.R. Co. v. U.S., supra."

Manifestly, SACAL is seeking to have the NVOCCS reimburse it for any financial loss it may sustain by reason of its collective bargaining agreement with the Longshoremen. This is not a true embargo but rather an attempt to modify its tariff in violation of the law.

Sworn to before me, this
11th day of March 1969.

Notary Public

ROY M. JACOBS

SACAL

South Atlantic and Caribbean Line, Inc.
808 N.E. Second Avenue
Miami, Florida 33132
Telephone (305) 377-1756

EXHIBIT "A"

INDEMNITY

In Consideration of South Atlantic & Caribbean Line, Inc. (SACAL) accepting for loading aboard the MV ..... scheduled to sail on ..... trailer # ..... containing consolidated less than truck load shipments, without unloading and reloading the said trailer ..... , agrees to indemnify SACAL for any penalty assessed against SACAL by the International Longshoremen's Association pursuant to the Deep Sea Longshore Agreement, , 1969.

ATTACHMENT # 7

AFFIDAVIT

On March 7, 1969, I sent copies of the enclosed Embargo Notice and Supplement, by first class mail, to all persons having tariffs on file with the Federal Maritime Commission as non-vessel operating common carriers, other than exclusively household goods carriers.

INTERNATIONAL TARIFF SERVICES, INC.

Dean R. Putnam

Dean R. Putnam

On this 11th day of March, 1969, before me came Dean R. Putnam, who signed this document in my presence and swore that the contents thereof are true.

Notary Public D.C.

My Commission Expires With

April 30 1970

EXHIBIT "B"

WE REGRET WE MUST EMBARGO UNTIL FURTHER NOTICE TO OR FROM OUR PIERS IN MIAMI TRAILERS CONTAINING CONSOLIDATED SHIPMENTS AS DESCRIBED IN ARTICLE 19 OF THE DEEP SEA LONGSHOREMENS CONTRACT OF FEBRUARY 19 STOP. FORMAL NOTICE MAILED TO YOU TODAY.

s/ SOUTH ATLANTIC & CARIBBEAN LINES

CARL VENGEL, GENERAL MANAGER

Before the
Federal Maritime Commission

Docket 69-9

Response of
SOUTH ATLANTIC & CARIBBEAN LINE, INC.
Showing Cause

Attached is a "Summary and Chronology" of relevant facts based upon (1) the facts stated in the affidavits attached thereto; (2) facts which the Commission may officially notice; and, (3) conclusions based upon these facts.

The Commission should not order SACAL to cease and desist from carrying out the challenged embargo because:-

A. That order would cause, not correct, violation of section 2, Intercoastal Shipping Act, 1933.

B. The purpose and effect of the order is to compel SACAL to transport the embargoed traffic; the Commission is not authorized to compel a carrier to provide service.

C. SACAL has the lawful right to embargo cargo when the circumstances warrant.

D. The Instant Embargo was lawfully noticed and executed.

E. The circumstances here warrant the embargo of the NVO trailers

(1) The embargo is justified by physical conditions.

(2) The embargo prevents an undue advantage to NVO shippers and an undue disadvantage to all other shippers; and is in aid of the Commission's jurisdiction.

(3) The embargo is justified because of the unrecoverable financial loss which transportation of the traffic without appropriate tariff adjustments would impose upon SACAL.

(4) The embargo is justified because it is the duty of the shipper to properly prepare the shipment for transportation; because of the lawful labor agreement the embargoed traffic is not properly prepared for shipment.

A. The order would cause, not correct, violations of section 2, Intercoastal Shipping Act.

In consequence of what appears to SACAL to be a lawful agreement reached by lawful collective bargaining, it became impossible almost overnight for SACAL to transport certain traffic from Miami to San Juan except by performing a substantial additional terminal service - a terminal service SACAL has not heretofore performed in the transportation of that traffic, and a terminal service which SACAL is not required to perform in the transportation of any other traffic.

The traffic is that described in the Embargo Notice here challenged which, for all practical purposes is NVO traffic, i.e., traffic which non-vessel operating common carriers by water assemble for shipment at points other than marine terminal facilities, within the prescribed Miami area.

The additional service is the unloading of the loaded trailer at SACAL's terminal, and reloading of the same cargo into the same trailer (see Summary and Chronology, No. 10). SACAL's alternative to doing so, if they are to carry the traffic, is to breach, or to suborn the breach of, this lawful collective bargaining agreement.

Section 2 of the Intercoastal Shipping Act of 1933 expressly provides that the carrier's tariffs

> "---shall also state separately each terminal or other charge, privilege, or facility, granted or allowed, and any rules or regulations which in anywise change, affect, or determine any part or the aggregate of such aforesaid rates, - or the value of the service rendered to the -- consignor or consignee."
> (Emphasis added)

The applicable tariff items, Original Page 15 of SACAL's Tariff FMC-F No. 7 details the privileges included and the absorptions made. The "wharfage and handling" which the rate includes clearly is the wharfage and handling described on Fifth Revised Page 26 to SACAL's Freight Tariff FMC-F No. 5.

The fact then, is that if SACAL accepted this traffic, unloading and reloading the trailers as required by the Collective Bargaining Agreement, there would be a violation of section 2 of the Intercoastal Shipping Act, subjecting SACAL to penalty, because no provision of SACAL's tariff authorizes them to perform this service. On the other hand, if they breached the labor agreement by loading the trailer without unloading and reloading and paid the liquidated damages of $250., they would for this reason be in violation of section 2, subject to penalty, because nothing in their tariff authorizes this absorption, which clearly affects the "value of the service".

No provision in SACAL's tariff provides for the performance by SACAL of this additional terminal service, or for any other absorption or privilege than these specified in the tariff rate. Performing this new, additional terminal service without appropriate tariff provision therefore would violate section 2 of the Intercoastal Shipping Act, 1933.

We respectfully submit, therefore, that the Order to Show Cause is erroneous on its face since it assumes something contrary to the fact, i.e., that some provision of SACAL's tariffs would allow (require) SACAL to provide this new, substantial, additional terminal service, and should therefore be dismissed.

The cause why SACAL should not be ordered to cease and desist from carrying out the embargo is that, if SACAL did not carry out the embargo, they would provide substantial additional terminal services, not provided in their tariff, and thus be exposed to substantial fines for the violation of section 2, Intercoastal Shipping Act, 1933.

B. The Purpose and Effect of the Order is to compel SACAL to transport the Embargoed Cargo; the Commission is not authorized to compel a carrier to provide service

That the Commission is not authorized by the tariff filing requirements of the Intercoastal Shipping Act to compel a carrier to provide service has been precisely decided by a reviewing court. Your predecessors, in Intercoastal Rates to and From Berkely, and Emeryville, California, 1 U.S.S.B. 510, suspended and thereafter found unlawful the cancellation by the respondent carrier of certain joint, through rates. This restored to effect the earlier tariff filing providing for those joint through rates. As the Review Court said (McCormick S.S. Co. v. United States, 16 F.Supp. 45, 46):-

> "The effect of the challenged order was that shippers of intercoastal cargo to and from (the ports involved) would be entitled to offer petitioner cargo for this transport at the scheduled rates,

> "and upon refusal to carry, either recover damages (cite omitted) or, if irreparably damaged, compel acceptance of the shipment (cite omitted)."

The Court reversed the agency order, holding that under the Shipping Acts no power is given by Congress to compel a maritime carrier to continue an established service to any port. It was pointed out that under the scheme of the Interstate Commerce Act, carriers received advantages, including the limitation of competition through certification requirements, and in exchange were required to provide service. No like provisions appear in any act administered by this agency. The Court said, p. 48,

> "In interpreting phrases of acts of Congress regulating shipping, which are said to create in (your predecessors) the power to compel the steamship line to remain in the service of a certain port without granting to that company a similar protection against competitors who could take from it the business it had developed, the delegation of such power would have to be made in terms so clear that there is no possible ambiguity or doubt as to such intent."

The difference here is that the refusal to carry (the embargo) is of specifically described cargo. From the standpoint of a statutory authority, the result has to be the same, i.e., that the statute gives the Commission no authority to compel a carrier to provide service, and the Commission cannot do so indirectly, under the tariff filing requirements of section 2.

We grant, of course, that if refusal to carry particular cargo amounts to a discrimination against that cargo in violation of some prohibition of the Shipping Act, the Commission has every authority to order the discrimination ended, and this would include an order to carry the cargo. But, (1), the order to show cause herein alleges no such violation; (2) a finding of such a violation could be made only after notice and hearing, and - of the most importance - (3) the refusal to carry here is aimed at <u>preventing</u> a discrimination. SACAL is perfectly willing to carry this traffic upon the same terms and conditions under which it carries all other trailers; it is unwilling to extend to this traffic substantial terminal services or absorptions that it does not extend to other traffic, which are not part of the transportation service SACAL holds itself out to perform and which are not provided in SACAL's tariff.

The order to cease and desist should not issue because the purpose and intent of the order is to compel the carrier to provide service, and this the Commission is not authorized to do.

C. SACAL has the lawful right to Embargo Cargo when the <u>Circumstances warrant.</u>

SACAL is a common carrier by water; it is subject to the Shipping Act, 1916, and to the Intercoastal Shipping Act, 1933.

" The action of the respondent carrier in refusing to accept and transport shipments at carload rates was predicated upon the existence of the embargoes against carload traffic then in effect, and the question at issue resolves itself into a determination of whether the embargoes were properly invoked. The right of a common carrier to declare an embargo when the circumstances warrant such action is established, as is also the fact that the necessity for placing embargoes is a matter to be determined in the first instance by the carrier. ---." (Emphasis added)
Boston Wool Trade Asso. v. Merchant & Miners Trans. Co., 1 U.S.S.B. 32, 33 (Decided Dec. 13, 1921).

This decision of nearly half a century ago, reiterating the common law right of a common carrier to embargo where circumstances, in the judgement of the carrier, warranted, of course preceded the Intercoastal Shipping Act, 1933. However, nothing in that Act limits or restricts the right to embargo, or in anyway imposes a duty upon a carrier to provide service. Rather, the thrust of the statute simply is that when a carrier performs a transportation service within the scope of the statute, he must , if he performs the service, publish and file a tariff, and/perform the transportation pursuant to that tariff.

Holt Motor Co. v. Nicholson Universal S.S. Co., 56 F.Supp. 585, D.Ct., D. Minnesota, July 1, 1944, did involve an embargo by a common carrier by water who, (p. 589) "-- was a common carrier

governed by the provisions of the Intercoastal Shipping Act of 1933, as amended --." Citing Boston Wool, supra, the District Court also (p. 592) said:

> "Moreover, the right of a carrier to establish an embargo if circumstances warrant it, is sustained in Pennsylvania R. Co. v. Puritan Coal Mining Co. (237 U.S. 121, 133)".

That the tariff filing requirements of the Intercoastal Shipping Act have no effect upon the right to embargo is clearly shown by the further words of the District Court, at p. 592, that the factual question of whether the embargo was reasonable

> "---cannot be decided by any reference to the tariff or schedules of rules or regulations promulgated by the carriers. It is an exclusive factual question which involves extrinsic evidence. (cite omitted)."

And again, at p. 592:

> "---. It may be noted that it is generally recognized that an embargo notice need not be published as schedules and tariffs are promulgated. (cite omitted)."

D. The Instant Embargo was lawfully executed.

In Holt Motor Co. v. Nicholson Universal S.S. Co., supra, at p. 592, the District Court said:

> "---. It may be noted that it is generally recognized that an embargo notice need not be published as tariffs and schedules are promulgated. (cite omitted). Neither is

> "there any prescribed form of embargo (cite omitted). It is sufficient if the carrier promptly notifies the shippers who are users of its lines that it is not physically able to accept further shipments.---."

Here, the NVO users of SACAL's service directly affected by Article 19 were notified of the embargo, both by telephone and by telegram; and a copy of the Embargo Notice was mailed, first class, to all NVOs having a tariff on file with this Commission. Moreover, copies of the Embargo were provided to this Commission, both as notice and for posting with the public files of tariffs. (The copies so provided, however, were "rejected", apparently on the premise that it is more important to maintain the pristine purity of the public files than it is to accomplish the purpose of the filing requirement, i.e., to inform the shipping public.)

E. The circumstances here warrant the Embargo of the NVO Trailers.

(1) The Embargo is justified by the physical conditions.

The facts are that the normal offerings of NVO trailers to SACAL average fifteen 35-foot trailer per week, and have been as many as nineteen on a single sailing. To unload and reload fifteen trailers would require terminal space equal to the fifteen trailers plus room to land the contents and working room for labor and equipment. The evidence also is that SACAL's facilities are overtaxed

under normal circumstances; that the presently operating facilities at the Port of Miami do not now meet the growing needs of that port, and that all facilities, at the present time, are burdened with a heavy accumulation of cargo because of the strike.

Therefore, to perform this substantial, additional terminal service will aggravate an already aggravated chronic congestion. Congestion at terminals clearly causes expense and delay to all users of SACAL's service.

Congestion is a valid circumstance supporting an embargo; see Boston Wool Association, supra, where the carrier embargoed specific commodities and specific shipments, to lessen congestion; see also Helmly Furniture v. Merchants and Miners, 1 U.S.S.B., terminal congestion and a shortage of terminals.

We should point out that the alternative to performing this service at the marine terminal specifically is to breach or, in SACAL's case, to suborn the breach of a lawful collective bargaining agreement. SACAL is under no obligation to do so.

Therefore, the order to cease and desist should not issue because it would result in damage to all users of SACAL's service by aggravating existing congestion.

(2) The Embargo prevents an undue advantage to certain shippers and an undue disadvantage to all other shippers; and is in aid of the Commission's jurisdiction.

We have already pointed out the discrimination involved in extending to NVO traffic, without compensation therefore, services and facilities, not extended to other trailer shippers. It is fundamental that providing special privileges to certain traffic, without compensation, imposes the cost thereof on all traffic and is unlawful.

We have pointed out that the embargo also is designed to resist an effort to compel SACAL to extend terminal services and absorptions not provided in their tariff; it is therefore in aid of the Commission's own jurisdiction and responsibilities under section 2 of the Intercoastal Shipping Act, and is for a lawful purpose on these grounds as well. We have heretofore stressed that a cease and desist order would compel violation of section 2 and therefore should not be issued.

(3) The embargo is justified because of the financial loss which transportation of the traffic without appropriate tariff adjustments would impose upon SACAL.

The Commission had held that:-

"---. Generally speaking financial loss is not justification for the imposition of an embargo. New Orleans Traffic & Barge Line Co., 280 I.C.C. 105 (1951);

"New York Central Railroad Company v. United States, (201 F.Supp. 958 (USDC, S.D.N.Y. 1962))."1/

But, here, there is an essential difference in the facts. In both the Bull and the Sea-Land case, the financial loss was the consequence of changed costs in the transportation service which those carriers held themsleves out to perform. Here, it is the cost of the addition of an extra service which SACAL has not held themselves out to perform, either in their tariff or elsewhere; an extra service which is not necessary to the service which SACAL has held itself out to perform.

As we have quoted, the Commission in the Bull decision cites as authority for the holding that "generally, a financial loss is not justification" for an embargo, an Interstate Commerce Commission decision, and a decision of the District Court, Southern District of New York, which expressly approves the particular I.C.C. decision. In that New York Central case, the Southern District pointed out (201 F.Supp., at 959), that the Interstate Commerce Act imposes on carriers a statutory duty to furnish transportation upon request, and goes on to say:

1/ Order that A. H. Bull Steamship Co. Show Cause, 7 F.M.C. 133; see also Sea-Land Service, Inc. - Discontinuance of Jacksonville Service, 7 F.M.C. 646.

> "Thus, if the imposition of the embargo on the shipments is an unreasonable practise in violation of the Railroad's duty to provide transportation, the Commission has the power to issue an order annulling the embargo. ---." (Emphasis added)

In short, the authority of the I.C.C. to annul an embargo rests upon their authority to issue orders in respect of the express statutory duty of the carrier to provide service.

As we have seen, there is no corresponding duty, either in the Shipping Act, 1916, or the Intercoastal Shipping Act, 1933, for a carrier to provide service and this is precisely the distinction that the three judge court made in McCormick S.S. Co. v. United States, 16 F.Supp. 45. Thus, the authorities upon which the Commission relied for this authority to set aside an embargo based on financial loss simply do not apply to the statutes which the Commission administers.

(4) The Embargo is justified because it is the duty of the shipper to properly prepare the shipment for transportation; because of the lawful labor agreement, the embargoed traffic is not properly prepared for shipment.

A carrier may refuse to carry merchandise that is not properly packaged for shipment. It is the duty of the shipper to tender the merchandise in good order and condition for shipment; if he does not the carrier may refuse to carry it.

Here, the unit of the shipment is the loaded trailer; this is the unit upon which the ocean freight is charged. The

duty of the shipper to tender that unit in good order and condition is no less than as to any other unit - a package, a keg, etc.

Since, because of the lawful provision of the lawful collective bargaining agreement, the instant traffic must be loaded at a marine terminal by ILA labor, it follows that the tender of a trailer not so loaded is the tender of a shipment not in good order and condition for transportation.

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For the reasons stated, respondent South Atlantic & Caribbean Line, Inc., submits that the cease and desist order should not issue; that the instant embargo is lawfully issued, and that the circumstances warrant the embargo of the traffic.

Respectfully submitted,

SOUTH ATLANTIC & CARIBBEAN LINE, INC.

By: John Mason
Ragan & Mason, their counsel

John Mason, Esquire
Ragan & Mason
900 - 17th Street, N.W.
Washington, D. C.

March 11, 1969

[Certificate of Service Omitted in Printing]

Attachment No. 1

Before the
Federal Maritime Commission

Docket 69-9

Response of
SOUTH ATLANTIC & CARIBBEAN LINE, INC.
Summary and Chronology

This summary and chronology is based upon (1) facts stated in the affidavits attached hereto; (2) facts which the Commission may officially notice; and (3) conclusions based on those facts.

1. South Atlantic & Caribbean Line, Inc. (SACAL) are common carriers by water between, inter alia, Miami, Florida, and San Juan, Puerto Rico. That operation is subject to the Shipping Act, 1916 and the Intercoastal Shipping Act, 1933, and the jurisdiction of this Commission.

2. As required by section 2 of the Intercoastal Shipping Act, SACAL files with this Commission freight tariffs (schedules) showing all of the rates, fares and charges for or in connection with the transportation they perform/and the transportation they perform is performed pursuant to those freight tariffs. Included among the freight rates so published is

a so-called Freight All Kinds (FAK) rate. By this rate, the shipper is given the exclusive use of a highway trailer for such lawful use as he wishes to make of it in the transportation of merchandise from Miami to San Juan. SACAL spots the empty trailer at the shipper's premises in the limits of Greater Miami, as described in the tariff; after loading by the shipper, SACAL picks up the loaded trailer, transfers it to their marine terminal, either directly or by way of their marshalling yard at 9300 N.W. 36th Avenue, Miami (depending upon operating requirements at the time), for loading aboard their ships for transportation to San Juan without further handling of the contents of the trailer. It is immaterial whether the shipper loads the trailer with one or with several commodities; or whether he utilizes all or a part of the capacity of the trailer. The flat rate per trailer is $700. in the case of a 35-foot trailer, $800. in the case of a 40-foot trailer. The transportation so provided requires no covered or sheltered facilities, either at the marine terminal or at the marshalling yard.

As required by section 2, the tariff states separately the terminal privileges or facilities granted, and rules affecting the value of the service performed. Copies of the tariff item are attached.

3. In addition to the transportation of highway trailers (and other rolling vehicles, equipment, etc.) SACAL also publishes rates applicable to, and carries so-called "break-bulk" cargo. This

consists of commodities delivered to SACAL at their marine terminal for transportation in their normal, ordinary, shipping packaging. Proper care and custody requires that this traffic be received, and held for loading, under cover as protection from the elements and other risks of transportation. It is received at SACAL's marine terminal and held in a shed; it is loaded in the "break-bulk" areas of SACAL's ships. Some of it, in the shed, is packaged into small containers of various sizes, or on pallets which containers or pallets in turn are loaded into the said "break-bulk" areas.

4. SACAL's marine terminal operations 1/ at Miami are performed by Eagle, Inc., an unrelated company, pursuant to Eagle's tariff filed with this agency. SACAL's ships berth at Bay #66, Dodge Island, Miami. / Eagle has the right, in common with other terminal operators and carriers, to utilize an open storage area across a public roadway from the berth at Bay #66, for the marshalling and staging of trailers and other terminal activities for SACAL and other persons for whom Eagle performs terminal services. Use of the area is pursuant to Port of Miami Tariff No. 9, on file with this Commission. No part of the area is designated for the use - exclusive or otherwise - of Eagle or of SACAL. The area is used by Eagle, SACAL, and others

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1/ Eagle also stevedores SACAL's ships at Miami, see post.

for the marshalling of trailers, other rolling or wheeled cargo, and equipment used in loading and unloading the ships.

In the same way, Eagle has the non-exclusive use of Transit Warehouse #3, Dodge Island. The facility has about 36,000 square feet of space, of which 2,000 square feet are enclosed in-bond areas and office. Eagle receives and delivers break-bulk cargo there for SACAL and for another carrier providing regular common carrier service to and from Miami. Usually, about 50% to 60% of the warehouse space, after allowance for aisles, etc., is available for SACAL's break-bulk and other traffic which must be received and held under cover. Again, the use is pursuant to the Port of Miami Tariff No. 9; there is no lease or other formal allocation of the warehouse to Eagle, Inc.

Eagle, Inc., in the past has attempted, without success, to obtain the use of additional space as have other operators, but there is none to be had.

5. On February 19, 1969, retroactive in effect to October 1, 1968, the International Longshoreman's Association and the employers of longshoremen at the Port of Miami (hereafter "employers"), executed a "deepsea Longshore Agreement" including, among other things,"Article 19. Containerization"- see attachment to Affidavit of H.G. Teitelbaum. Rule 2 of that Article requires that trailers delivered to the docks for loading aboard ship (or

unloaded from ships for delivery), containing "LTL loads or consolidated full-container loads" as described must be unloaded and reloaded at a waterfront "facility, pier or dock", with ILA labor under current ILA wages and conditions. Failure to unload and reload such a trailer expressly is a "violation of the contract between the parties". If such a trailer is loaded aboard ship without unloading and reloading, Rule 3(e) provides that

> "---the steamship carrier shall pay to the joint Welfare Fund liquidated damages of $250. per container which should have been stuffed or stripped." (Emphasis added)

As relevant to SACAL's operations, the traffic affected by this provision is the traffic of NVOs (see post), and shall hereafter be referred to as NVO traffic.

The requirement literally and in fact, requires two separate handlings. The safe loading of a mixed trailer requires the concentration of weight (i.e., heavier commodities), over the tandem. If the load were simply moved, in continuous handling, from one trailer to another, the weight distribution would be reversed.

6. SACAL's stevedoring at Miami is performed by an independent contractor, Eagle, Inc. SACAL are not themselves an employer of longshore labor at Miami, did not take part in the relevant collective bargaining, and are not a party to the contract. However, SACAL accepts (at the least, arguendo), that the said

Article 19 is a lawful result of lawful collective bargaining; and that Article 19, is a lawful limitation upon the transportation service which SACAL, as a common carrier by water, can perform at the Port of Miami.

(SACAL doubts the right of the ILA and the "employers" to provide that liquidated damages for the breach of a contract "between the parties" will be paid by a person not a party, i.e., "the steamship carrier". However, as a practical matter the same results which concern us here would follow if the damages were payable by the "employer", as a matter of the contract between stevedore and carrier. Thus, the irregularity may be ignored here. Moreover, SACAL suspects that this unique provision is more the doings of the "employers" than of the ILA, and that the ILA couldn't care less who pays, so long as it is paid.)

7. An NVO has been defined by this Commission as a non-vessel operating common carrier by water. It assembles shipments - usually, but not necessarily, small, LTL shipments - which they consolidate for shipment over the underlying common carrier by water as a full trailer lot. This Commission has held that in its relationship with shippers an NVO is a common carrier, subject to all of the obligations and responsibilities of a common carrier, but that in its relationship with the underlying common carrier by water

it is a shipper. The NVOs in the Miami area all assemble their traffic and load the trailers at points which are not a "waterfront facility, pier or dock" within the meaning of Article 19, supra.

8. NVO traffic, i.e., full trailerloads of consolidated shipments, shipped by NVOs over SACAL's service from Miami to San Juan is valuable traffic to SACAL. Over the past year SACAL has averaged 15 trailerloads of this traffic per sailing from Miami and on occasion have had as many as 20 trailers on a single sailing. The receipt of small lots of LTL traffic, each involving a separate truck delivery, at a point other than SACAL's marine terminal; the fact that SACAL need issue only one bill of lading, and effect one collection of freight moneys for the trailer load, rather than issuin bills of lading and collecting freights for the many LTL shipments, have enabled SACAL to effect economies both in terminal operations and in administration. SACAL has encouraged and cooperated with NVOs in the development of their business. While the revenues which SACAL would receive at break-bulk or LTL rates are substantially higher per unit of weight or measurement than the revenue yield of the per trailer rate and thus would compensate the loss of those economies, the receipt and delivery by SACAL of these shipments at the already over-taxed shed facilities would aggravate the present congestion. Accordingly, SACAL's efforts, post, have been to find some way to accommodate both the interests of the ILA and the NVOs.

9. With the effectiveness of Article 19, supra, SACAL, if they are to handle this NVO traffic at all, must either:

(a) Unload the contents from the trailer, and reload them back into the trailer; or,

(b) breach (or suborn the breach), of the lawful collective bargaining agreement, by loading the trailer to the ship without unloading and reloading the contents, and (assuming consent of the union to this breach)

(i) absorb from their present ocean freight rate of $700. per trailer the liquidated damage penalty of $250. per trailer, or

(ii) increase their ocean freight rate on this traffic to $950. per trailer, if they are to remain in their present revenue position.

10. In the unloading and reloading of the trailers SACAL must

(a) Break the seal of the trailer and rehandle the contents. This significantly affects the measure of SACAL's liabilities in the

care and custody of the cargo.

(b) Unload the trailer contents to the ground, and reload them in the same order as originally loaded into the trailer, in order to retain the same weight distribution. This in turn requires

(i) labor, subject to the minimum gang and working hour requirements of the agreement.

(ii) Supervisory personnel.

(iii) Space nearby each trailer, not less than the area of the trailer, plus working room for the handling of the cargo.

(c) Should the unloading and reloading be done without shelter, weather and other risks will both expose the cargo to damage and cause delay. To avoid this, the work must be done under shelter.

(d) It is supposed that the NVOs have developed skills in obtaining the maximum utility of the trailer cube. Should less experienced labor fail to reload in exactly the same

way, SACAL would be obliged to provide additional trailer or other space aboard ship for any "over flow"; and separately handle that overflow both at Miami and San Juan.

SACAL's terminal facilities are now over-taxed. The accumulation of traffic because of the strike taxes still further these already over-taxed facilities. It is physically impossible for SACAL at this time to take NVO trailers now offering (an average of 15 per sailing in the past), into their limited shedded facilities to perform this stripping and stuffing on each trailer. To do so even on a limited basis would require selection as between competing NVOs, and thereby exposure to charges of preference and prejudice, and would add to the existing congestion, to the detriment of SACAL's service to all shippers.

The welfare and interest of the actual shipper must be considered. Their goods will be handled once at the NVO facility, twice at the marine terminal, and once again at destination. The shipper's interest is to get his goods onto Puerto Rican shelves in saleable condition, not in claims for damage in consequence of endless handlings and rehandlings.

11. It would be pointless for SACAL to raise their ocean freight rate on this traffic to $950. per 35-foot trailer, an

increase of 35.7%, (should the ILA consent to the breach of Article 19), or to such other amount necessary to compensate the increased costs and liabilities of rehandling, supra. This is because of the competition of TMT Trailer Ferry, Inc., a common carrier by water operating tugs and barges between Miami and San Juan. TMT utilizes non-union labor, and is not effected by Article 19. TMT is operated by a Trustee in Bankruptcy, and it is SACAL's belief that this has effectively immunized TMT from union organization at Miami. An increase of $250. would simply divert the traffic to the non-union carrier, TMT, or to another port.

12. SACAL does not unload and reload the trailers of other shippers which, through overloading or other improper loading, cannot be accepted for shipment, but instead requires that the shipper do so.

13. For the reasons stated in paragraphs 9 through 12 hereof, and particularly because of their belief that the enforcement of Article 19 will divert the traffic to the non-union TMT, and to other ports where there is no provision comparable to Article 19 SACAL petitioned the ILA to defer enforcement of Article 19 pending SACAL's efforts to work out something which, consistent with the regulatory requirement of this agency, would give the best possible effect to the legitimate interests of the ILA, the NVOs, SACAL's other users and, of course, of SACAL.

14. Representatives of the ILA being unable or unwilling to assure SACAL in writing that Article 19 would not be enforced, as requested, SACAL with the foreknowledge of the ILA then agreed to accept NVO trailers for transportation without unloading and reloading subject to an agreement by the NVOs to indemnify SACAL should the ILA at some future time demand payment of the liquidated damages. SACAL made this offer on the premise that the service here required is not a part of the transportation service they perform, and therefore is a non-transportation service for which SACAL is entitled to reimbursement. SACAL are not in the business of unloading and reloading trailers for other carriers; the unloading and reloading of trailers is not something which, by their tariff, they hold themselves as doing in the course of their transportation service, and is not necessary to the performance of that transportation service. They recognized, however, a "trial risk", but were nevertheless willing to accept that risk to temporarily cut the Gordian knot, and move the traffic.

15. On three sailings 32 NVO trailers were carried pursuant to such an indemnity. However, at a meeting in Miami on March 4th, certain NVOs advised SACAL that they were dissatisfied with the arrangement; and insisted that SACAL was obliged by their tariff to carry the traffic as offered, at the $700. rate, regardless of the consequences. Since those consequences included at the present

time terminal congestions which would be detrimental to the service which SACAL performs for all users, and the exposure of SACAL to penalties for violation of the Intercoastal Shipping Act SACAL embargoed the NVO traffic until such time as the terminal congestions could be avoided, and a reasonable solution of the dilemna reached.

16. SACAL continues their efforts to reach such a solution. The NVO traffic has been valuable to SACAL in the past; they hope it continues to be valuable in the future.

Respectfully submitted,

SOUTH ATLANTIC & CARIBBEAN LINE, INC.

By: John Mason
Ragan & Mason, their counsel

John Mason, Esquire
Ragan & Mason
900 - 17th Street, N.W.
Washington, D.C.
March 11, 1969

CERTIFICATE OF SERVICE

I hereby certify that I have served the foregoing document upon all parties of interest either by mailing a copy via first-class mail (postage prepaid) or by delivering a copy in person.

John Mason

March 11, 1969

February 20, 1969.

International Longshoremen's
Association,
Miami, Florida.

Gentlemen:

South Atlantic & Caribbean Line, Inc. (SACAL) is a common carrier by water between Miami and Jacksonville in Florida and San Juan in Puerto Rico. They are subject to the Intercoastal Shipping Act of 1933 as amended.

The Deep Sea Longshore Agreement of February 19, 1969, contains certain provisions which, because of the Intercoastal Shipping Act of 1933, it will not be possible for SACAL to put into effect immediately.

The provisions of the Agreement are those requiring that consolidated containers, as described in the Agreement be stripped and reloaded at SACAL's loading berth, and, if not stripped and reloaded, subject SACAL to a penalty of $250 per box. SACAL's problems are these:

1. The Intercoastal Shipping Act of 1933 requires that SACAL assess ocean freight only as provided in their filed tariff. This tariff must state, "Each terminal or other charge--and any rules or regulations

which in any ways change, effect, or determine any part of the rates".

SACAL can change their present rates only by filing an amendment to the tariff effective upon 30 days notice. Footnote 1.

2. It is economically impossible for SACAL, at their present rate of $730 to either strip and reload consolidated containers at their loading berth, or assume the expense of the $250 penalty.

For not doing so, moreover, breaking of the seal of consolidated containers and the stripping and reloading will subject SACAL to substantial liabilities for loss and damage to the contents and thus require additional insurance and claims cost.

We have, therefore, instructed our attorney in Washington to prepare and file with the Federal Maritime Commission, obtaining special permission to do so upon less than 30 days notice if possible, amendments to our tariff which will (A) embargo the delivering to SACAL of consolidated containers which under the Agreement must be stripped and reloaded at the pier and (B) provide that where the $250 penalty is paid by SACAL that charge will be assessed against the shipper in addition to the otherwise applicable freight rate and charges.

In the circumstances, I request your agreement that these new provisions of the Deep Sea Agreement be deferred until the necessary changes to SACAL's tariff can be made. If a deferment is not granted, SACAL will not be able to carry this kind of traffic, and the effect will be to divert it to a competing carrier, TMT, who does not employ I.L.A. longshoremen.

FOOTNOTE 1 - The FMC may "For good cause" allow changes upon less than 30 days notice.

Yours truly,

SOUTH ATLANTIC & CARIBBEAN LINE, INC.,

CARL VENGEL,
Vice President & General Manager.

A F F I D A V I T

My name is Carl Vengel and I am Vice President & General Manager of South Atlantic & Caribbean Line, Inc.

I caused the following telegram to be sent to all N. V. O. carriers in the Miami area on March 7, 1969:

"We regret we must embargo, until further notice, the delivery to or from our piers in Miami, Florida, trailers containing consolidated shipments as described in Article 19 of the Deep Sea Longshore Agreement of February 19, 1969, formal notice mailed to you today."

The N. V. O. carriers to whom this telegram was sent are the following:

Transconex, Inc.

Waterborne Trailers

United Freighways

Twin Express

Puerto Rican Forwarding Co. Inc.

In addition, upon my instructions, each of them was notified by telephone on the preceding day.

Carl Vengel
Vice President & General Manager
South Atlantic & Caribbean Line, Inc.

[Jurat Omitted in Printing]

My name is Hyman G. Teitelbaum. I am president of Eagle, Inc. Eagle, Inc. is a stevedore and a marine terminal operator in the Ports of Miami and Jacksonville.

At Miami we perform the stevedoring for the ships of South Atlantic & Caribbean Line (Sacal) and for other companies. We also perform the marine terminal work, under the terms of our terminal tariff, for Sacal and for other carriers by water.

Eagle employs I.L.A. labor. Eagle is a party ro the Deep Sea Longshore Agreement of February 19, 1969 and I took part in the negotiations leading up to that Agreement. The attachment hereto is a true copy of Article 19 of that Agreement.

Eagle stevedores the Sacal ships at the berth at Bay 66 at Dodge Island. Under the present arrangements with the Port of Miami no exclusive or preferential use is given to any open area for the storage and handling of trailers. The area that we use for the Sacal trailers is also used for the trailers of other carriers.

Eagle, Inc. has been assigned the use of Transit Warehouse #3 at Dodge Island. This has a total area of 36,000 square feet. About 2,000 square feet are occupied by an enclosed bonded cage and a small office. Eagle uses this warehouse for the receipt and delivery of the break bulk cargo for Sacal and for the receipt and delivery of cargo of other carriers. About 50% to 60% of the capacity, after allowance for aisles, doorways and working space is usually available for Sacal's break bulk cargo. This area is also used for the stowing of this cargo into small containers and for palletized cargo.

Additional space is not available. I have made requests to the Port of Miami for additional warehouse space a number of times over the

past several years. I also know that other terminal operators have not been able to get additional space.

Hyman G. Teitelbaum, President
Eagle, Inc.

[Jurat Omitted in Printing]

Rules on Containers (continued)

Rule 2. Rule of Stripping and Stuffing Applied to Such Containers

A container which comes within each and all of the criteria set forth in Rule 1 above shall be stuffed and stripped by ILA longshore labor. Such ILA labor shall be paid and employed at longshore rates under the terms and conditions of the General Cargo Agreement. Such stuffing and stripping shall be performed on a waterfront facility, pier or dock. No container of cargo shall be stuffed or stripped by ILA longshore labor more than once. Notwithstanding the above provisions, LCL loads or consolidated container loads of mail, of household goods with no other type of cargo in the container, and of personal effects of military personnel shall be exempt from the rule of stripping and stuffing.

Rule 3. Rules on No Avoidance or Evasion

The above rules are intended to be fairly and reasonably applied by the parties. To obtain non-discriminatory and fair implementation of the above, the following principles shall apply:

(a) Agreement in the Port as to the geographic area as provided in Rule 1-(c) is based on present LCL movement patterns in the port. Should any person, firm or corporation, for the purpose of evading the provisions of Rule 2 hereof, seek to change such pattern by shifting its operations to, or commencing new operations at, a point outside said agreed-upon geographic area, then either party may raise the

question whether said point should be included within the said geographic area, and upon agreement that the purpose of the shift in its operations was to evade the provisions of Rule 2, then said point shall be deemed to be within the said geographic area for the purpose of these rules.

(b) Containers owned or leased by companies which are affiliated either directly or through a holding company with an employer-member shall be deemed to be containers owned or leased by employer-members. Affiliation shall include subsidiaries and/or affiliates which are effectively controlled by the employer-member, its parent, or stockholders of either of them.

(c) It shall be the obligation of employer-members to clearly mark each container's documentation as to whether or not it is a Rule 1 container which is to be stuffed and stripped at the waterfront facility (pier or dock).

3 Rule 3. Rules on No Avoidance or Evasion (continued)

(d) Each employer-member shall keep records of each container supplied to a consolidator or other non-owner of cargo, located within the agreed geographic area, and such record shall be available to the committee provided in (g) below. With respect to all containers received at or delivered from the waterfront facility, (pier or dock) a record of the same shall be made by ILA checkers or Clerks.

(e) Failure to stuff or strip a container as required under these rules will be considered a violation of the contract between the parties. Use of improper, fictitious or incorrect documentation to evade the provisions of Rule 2 shall also be considered a violation of the contract. If for any reason a container is no longer at the waterfront facility at which it should have been stuffed or stripped under the rules then the steam-

ship carrier shall pay to the joint Welfare Fund liquidated damages of $250 per container which should have been stuffed or stripped.

(f) If any shippers or their agents who have at any time used, are now using, or in the future use containers owned or leased by employer-members, hereafter use containers not owned or leased by employer-members, for the purpose of evading the provisions of Rule 2 hereof, then the containers so used shall be considered to be within Rule 1 and Rule 2.

(g) A committee represented equally by management and union shall be formed and shall have the responsibility and power to hear and pass judgment on any violations of these rules. Any inability to agree shall be processed as a grievance under the applicable contract except as limited by 3(h) hereof.

(h) If the purpose of protecting and preserving the present work jurisdiction of longshoremen and all other deepsea ILA crafts over any containers loaded with LTL cargo, or consolidated full container loads as defined herein is not accomplished by the provisions of these rules on containers, then either party shall have the right to renegotiate these provisions or any part thereof by giving notice to the other party. This provision shall not be subject to arbitration. Pending renegotiation and settlement of the given dispute, the employees may decline to work any containers involved in the dispute and such refusal to work shall not be subject to arbitration. The renegotiation referred to above will not be subject to arbitration. Interpretation of this provision shall not be determined by an arbitrator but by a court of competent jurisdiction.

19. CONTAINERIZATION--

(a) Containers owned or leased by employer-members (including containers on wheels) containing LTL loads or consolidated full-container loads, which are destined for or come from, any person (including a consolidator who stuffs containers of outbound cargo or a distributor who strips containers of inbound

ca go and including a forwarder, who is either a consolidator of outbound cargo or a distributor of inbound cargo) who is not the beneficial owner of the cargo, and which either comes from or is destined to any point within a 50 mile radius from the center of any/ of the ports covered under this Agreement shall be stuffed and stripped by ILA labor at longshore rates on a waterfront facility under the terms and conditions of the General Cargo Agreement. (Rules on Containers are below.)

RULES ON CONTAINERS

The following provisions are intended to protect and preserve the work jurisdiction of longshoremen and all other ILA crafts at deepsea piers or terminals. To assure compliance with the collective bargaining provisions the following rules and regulations shall be applied:

Rule 1. Definitions and Rule as to Containers Covered

Stuffing--means the act of placing cargo into a container.

Stripping--means the act of removing cargo from a container.

Loading--means the act of placing containers aboard a vessel.

Discharing--means the act of removing containers from a vessel.

These provisions relate solely to containers meeting each and all of the following criteria.

(a) Containers owned or leased by employer-members (including containers on wheels) which contain LTL loads or consolidated full container loads.

(b) Such containers which come from or go to any person (including a consolidator who stuffs containers of outbound cargo or a distributor who strips containers of inbound cargo and including a forwarder, who is either a consolidator of outbound cargo or a distributor of inbound cargo) who is not the beneficial owner of the cargo.

(c) Such containers which come from or go to any point within a geographical area described by a 50 mile circle with its radius extending out from the center of each port.

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1 My name is Carl Vengel, I am Vice President and General Manager of South Atlantic & Caribbean Line, Inc.

SACAL's ships at Miami load and discharge at Bay #66, Dodge Island. SACAL's terminal operations in the receipt and delivery of cargo including cargo in trailers is performed by a terminal operator, Eagle, Inc. Eagle, Inc., under contract with SACAL, also stevedores the ships.

At Dodge Island an area of approximately 93,000 square feet is used for the marshalling of trailers and other rolling equipment. Tractors, forklifts and other equipment used in the terminal and stevedoring operations are kept in the area. There is no formal allocation of this space to Eagle by the Port of Miami. It is informally marked off by poles laid at intervals on the approximate boundaries. The use of the area is regulated entirely by the Port of Miami Tariff #9. The area is across the public roadway from the berthing apron at Bay 66. The area is not used exclusively for SACAL's needs, but is also used by other persons.

In the handling of trailers, SACAL requires sufficient room not only to accommodate trailers

accummulated for loading aboard their ships, but also to simultaneously accommodate loaded and empty trailers discharged on the inbound voyage. The underdeck capacity of the MV FLORIDIAN is 33, 35 foot trailers; the ondeck capacity is 27, 35 foot trailers. This capacity excludes automobile space, and the utilization of the trailer capacity will vary from voyage to voyage depending on the cargo mix. It is not possible, as a trailer is unloaded on the inbound voyage to immediately replace it with an outbound trailer on a one-for-one basis. Rather, the entire underdeck must be cleared of inbound trailers before any outbound trailers can be loaded; and in the same way, the ondeck areas must be cleared of inbound trailers before any outbound trailers can be loaded. Thus, the on-shore trailer area requirement approaches two trailers to each one trailer of the ships' capacity.

Because of the normal congestion due to the limitation of trailer space at Dodge Island, SACAL does not perform its' own trailer maintenance at Dodge Island, but instead maintains a separate facility at 9300 N. W. 36th Avenue, Miami. This facility is also used for the receipt of trailer cargo, particularly refrigerated trailers which are brought forward to the loading terminals as required for loading aboard the ship. Even under normal conditions, it would not be physically possible to accommodate all of this traffic in the trailer area at the terminal. This is due not only to the lack of electrical outlets for refrigerated trailers at the Dodge Island trailer area, but also to the limited space.

In addition to trailer and other roll-on roll-off cargo, SACAL also carries aboard their ships breakbulk cargo. The capacity for this breakbulk cargo is approximately 13,000 cubic feet. This cargo is delivered to SACAL at Eagle's Transit Warehouse #3 at Dodge Island. The traffic is delivered by the shippers in the original packaging of the particular commodities. The proper care and custody of this cargo requires that it be received and held for shipment under cover. Transit Warehouse #3 contains
3 36,000 square feet of storage space of which about 2,000 square feet is occupied by fenced-in bonded areas and a small office. Eagle receives cargo at this Warehouse for SACAL and for other carriers for whom they act as terminal operators. Approximately 50% to 60% of the capacity, less necessary aisles, etc. usually is available for SACAL's cargo. SACAL carryings of breakbulk average approximately 12,000 cubic feet per weekly voyage. Current voyages are running to 18,000 cubic feet. The space available for the handling of that traffic is no more than necessary for present normal requirements. Space must also be provided within the shed for the loading of some of this traffic into small containers and on pallets, since by tariff limitation, the breakbulk cargo handled by SACAL must be of a type that can be handled by forklifts.

The facilities available to SACAL for the receipt and delivery are barely adequate for their normal operations. A fifty-nine day longshoremen strike has resulted in an accummulation of cargo to be moved which is currently placing abnormal demands on those facilities.

For SACAL or their terminal operator, Eagle, Inc. on their behalf to unload and reload trailers of mixed commodities at these marine terminal facilities they would have to

1) break the seal of the trailer;

2) unload the trailer contents to the ground (or shed floor) and reload in the same order as originally loaded into the trailer in order to retain the same weight distribution. (The trailers travel over the highways in both Miami and San Juan. In the loading of a mixed trailer, the heavier commodities should be connected over the tandem.)

3) provide, in addition for space for the trailer itself, a free area not less than the area of the trailer plus working room for men and equipment;

4) provide labour, subject to the minimum gang and working hours of the I. L. A. Agreement;

5) provide supervisory personnel.

In addition, if for any reason the labour performing this unloading and reloading does not make as effective use of the trailer capacity as the N. V. O. has done, SACAL must provide other space for the storage of any overflow, and provide for the transportation to and delivery of that overflow at San Juan.

As stated above, SACAL does not perform its' own terminal operations and stevedoring, but engages Eagle, Inc., an unrelated company, to perform this service. SACAL, therefore, is not an employer of I. L. A. labour, did not take part in negotiations with the I. L. A., and

is not a party to the collective bargining agreement of February 19, 1969. We accept Article 19 of that Agreement as a lawful provision, and intend to observe that provision in our operations.

I was, of course, aware that the issues resolved by Article 19 were an important subject of negotiation between the employers and I. L. A. members. I was hopeful that because of the particular circumstances at Miami, some other arrangement than Article 19 might be reached. At the present time, Miami is the only Port between New Orleans to the west, and Norfolk to the north where this provision is in effect.

When the terms of February 19th Agreement became known to me, I immediately, on the next day, February 20, addressed a letter to the I. L. A. calling attention to the regulatory requirements of the Intercoastal Shipping Act of 1933 and of the non-union competition to SACAL by TMT Trailer-Ferry, Inc. We requested the I. L. A. to defer enforcement of Article 19 until SACAL could work out reasonable arrangements. A copy of that letter is attached hereto. I also entered into discussions with the N. V. O. carriers in this area in an attempt to resolve the problems presented in Article 19 in the most expeditious way possible, consistent with the interest of all persons concerned, including the Federal Maritime Commission. When it became apparent that the representatives of the I. L. A. could not give me written assurances that the enforcement of Article 19 would be deferred and after

consultation with the company's lawyer, I proposed to the N. V. O. carriers that in order to move their traffic without delay, we would do so under an indemnity from them to make us whole should the I. L. A. now or at some future time enforce the liquidated damage provision of Article 19. I was aware that the argument would probably be made that the indemnity was invalid and that its' validity would depend on our establishing that the additional service or undertakings which we took on were not our obligation as a common carrier, and that we were, therefore, lawfully entitled to reimbursement. On the first three sailings immediately following the termination of the strike, a total of thirty-two trailers moved under such an indemnity.

At a meeting on March 4, 1969, certain N. V. O. carriers advised me that they were not satisfied further to indemnify us and insisted that SACAL was obliged to carry the traffic as offered at the $700 per trailer rate, without regard to the consequences. Since, as stated above, those consequences included the aggrevation of an already congested terminal operation which would limit SACAL's ability to serve all its' users and would indeed require that shipments not be accepted due to lack of space for receiving and storage of them, it was our judgment that the best interest of all concerned was served by refusing to transport, through an embargo, this N. V. O. traffic until such time as appropriate arrangements or adjustments can be made.

The N. V. O. traffic in the past has been valuable traffic for SACAL. We have averaged approximately 15 trailer loads of this traffic on each sailing from Miami, and on occasion have put up to 20 trailers on a single sailing. The transportation of this traffic in trailer load lots relieves the normal congestion at our marine terminals. The delivery of all of this LTL cargo and other traffic by the shipper to our limited shed facilities obviously would ~~even~~ over tax an already overtaxed facility. Moreover, the N. V. O. operation reduces SACAL's administration costs in the preparing of bills of lading and collecting of freights for the many individual shipments.

It is clearly to our interest to find some way to take into account both the interests of the I. L. A., those of the N. V. O. and those of SACAL. This is what I have tried to do since February 20, and that is what I still am trying to do. At the same time, I do not feel justified in performing this extensive, expensive additional service for this one segment of the users of our service at the expense and detriment of all of the users of our service.

It would accomplish nothing for me to simply raise the ocean freight rate on this traffic. The increase would have to be no less than $250 per trailer and because of the non-union competition of TMT, I simply do not believe that the N. V. O. carriers would continue to use SACAL at a cost to them of at least $250 more than by TMT.

It has been our practise when improperly loaded trailers are delivered to us, as in the case of over-loaded trailers, to require the shipper to correct the improper loading. We have not heretofor performed the service of unloading and reloading trailers for anyone.

Carl Vengel

Carl Vengel
Vice President & General Manager
South Atlantic & Caribbean Line, Inc.

[Jurat Omitted in Printing]

DOMESTIC SERVICE
Check the class of service desired; otherwise this message will be sent as a fast telegram

TELEGRAM	
DAY LETTER	
NIGHT LETTER	

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S
E

WESTERN UNION
TELEGRAM

INTERNATIONAL SERVICE
Check the class of service desired; otherwise the message will be sent at the full rate

FULL RATE	
LETTER TELEGRAM	
SHORE-SHIP	

NO. WDS.-CL. OF SVC.	PD. OR COLL.	CASH NO.	CHARGE TO THE ACCOUNT OF	TIME FILED
			REGAN & MASON	

Send the following message, subject to the terms on back hereof, which are hereby agreed to

SECRETARY
FEDERAL MARITIME COMMISSION
WASHINGTON, D.C.

RESPONDENT SOUTH ATLANTIC & CARIBBEAN LINE, INC., HEREBY REQUESTS THAT THE COMMISSION'S ORDER TO SHOW CAUSE IN DOCKET 69-9 BE CLARIFIED AS FOLLOWS:

1. THE CLARIFICATION REQUIRED IS THAT SACAL "HAS ON FILE WITH THE FEDERAL MARITIME COMMISSION A SCHEDULE OF FREIGHT RATES WHICH APPLY TO LTL LOADS OR CONSOLIDATED FULL CONTAINERS OF CONSOLIDATORS AND/OR DISTRIBUTORS WHO ARE NOT THE BENEFICIAL OWNERS OF SUCH CARGO; AND WHICH COME FROM OR GO TO POINTS WITHIN A GEOGRAPHICAL AREA DESCRIBED BY A 50-MILE CIRCLE WITH ITS RADIUS EXTENDING, RESPECTIVELY, FROM THE CENTER OF MIAMI, FLORIDA."

2. THE CLARIFICATION REQUIRED IS THAT THE COMMISSION SPECIFY THE PROVISION OF SACAL'S TARIFF WHICH IN THEIR JUDGMENT AND WITHIN THE MEANING OF SECTION 2 OF THE INTERCOASTAL SHIPPING ACT ALLOWS OR REQUIRES SACAL TO PERFORM THE ADDITIONAL TERMINAL SERVICE DESCRIBED IN THE EMBARGO NOTICE, SACAL KNOWS OF NO SUCH PROVISION.

3. THE RELEVANT PART OF SECTION 2 REQUIRES THAT THE TARIFF "STATE SEPARATELY EACH TERMINAL OR OTHER CHARGE, PRIVILEGE, OR FACILITY GRANTED OR ALLOWED."

4. IT IS REQUESTED THAT THE CLARIFICATION BE ISSUED SUFFICIENTLY IN ADVANCE OF THE SCHEDULED ORAL ARGUMENT TO ALLOW REASONABLE CONSIDERATION BY SACAL BEFORE ORAL ARGUMENT.

JOHN MASON

March 11, 1969

WU1206(R2-65)

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TLX GOVT PD WASHINGTON DC 3-12-69 342P
JOHN MASON, ESQ. RAGAN AND MASON
900 - 17TH ST NW WASHINGTON DC
DOCKET 69-9 - REURTEL REQUESTING COMMISSION TO SPECIFY WHICH PROVISION OF SACAL TARIFF OR SECTION 2 INTERCOASTAL ACT REQUIRES PERFORMANCE OF ADDITIONAL TERMINAL SERVICE DESCRIBED IN EMBARGO NOTICE.
THE CLARIFICATION YOU REQUEST WOULD NECESSARILY ENTAIL TH PREJUDGMENT OF THE FIRST ISSUE RAISED IN YOUR RRRRRRESPONSE TO THE COMMISSIONS ORDER TO SHOW CAUSE (I.E. "A. THAT ORDER WOULD CAUSE, NOT CORRECT VIOLATION OF SECTION 2, INTERCOASTAL SHIPPING ACT, 1933") WHEREIN YOU ASSERT THAT THERE IS NO PROVISION IN

SF1201(R2-65)

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YOUR TARIFF OR SECTION 2 THAT WOULD AUTHORIZE THE PERFORMANCE OF "THE ADDITIONAL TERMINAL SERVICE REQUIRED BY THE EMBARGO NOTICE." ACCORDINGLY, YOUR REQUEST IS DEINED. BY THE COMMISSION.
THOMAS LISI SECRETARY FEDERAL MARITIME COMMISSION
GR 246P/FMAR/

SF1201(R2-65)

EXHIBIT D

Before the
Federal Maritime Commission

Docket No. 69-9

SOUTH ATLANTIC & CARIBBEAN LINE, INC.
Order to Show Cause

Petition to
Reopen for Clarification in Part
And For
Reconsideration in Part

Pursuant to Rule 16, Respondent, South Atlantic & Caribbean Line, Inc. (SACAL), respectfully petitions that the Commission reopen this matter for the purpose of clarifying and/or for reconsidering, as herein specified, their Report served April 4, 1969.

It should be stated preliminarily that since service of the Report herein Respondent has prepared and filed with the Commission a Special Permission Application to establish upon

short notice a rule which provides that trailers containing the relevant traffic

> "---will be booked and accepted by carrier for transportation without unloading and reloading of the contents of the trailer at carrier's terminals in any case where (a) the International Longshoreman's Association so agrees and (b) the consolidator shipper or the distributor consignee of any such trailer executes and delivers to carrier at the time of the booking or at the time of delivery an indemnity in the (form set out)."

With the effectiveness of this rule, Respondent will transmit a copy of the same, and a copy of the Commission's Report herein, to the International Longshoreman's Association at Miami advising them that unless and until the ILA advises otherwise SACAL will book and receive trailers containing this traffic for transportation by SACAL's vessels without unloading and reloading of the contents of the trailer, but subject of course to the liquidated damages provisions of the Deepsea Longshore Agreement and the indemnification referred to.

But, of course, this does not entirely eliminate the regulatory problems, and it is this which necessitates a clarification of the Commission's report. We respectfully suggest that it is impractical not to anticipate that it is within the right of the ILA under the Deepsea Longshore Agreement to insist at any given

time that the NVO trailers in fact be unloaded and reloaded at the terminal, and to provide for that probability. That is, after all, the provision of the agreement; the rule under which we propose to proceed simply contemplates a continuing breach of the agreement.

The Commission in its Report has reiterated the right of a carrier to impose an embargo where congestion at carrier's terminal facility is such that it is physically incapable of handling the traffic. Here the Commission, at page 3, states as follows:

> "SACL itself candidly admits that if the ILA does not insist upon its "right" to unload and reload NVO containers at the SACL terminal, it is physically capable of handling the traffic. Intervenors just as readily admit that if the ILA does insist upon unloading and reloading their containers, SACL's facilities would not be adequate. In other words, congestion is not a problem unless the ILA insists upon unloading and reloading the NVO trailers. As yet the ILA has not invoked Clause 19 and SACL has carried some NVO containers since the longshore agreement became effective." (Emphasis added).

Now, it seems to us that from the face of the Commission's report SACAL has the present right to now embargo this traffic where it must be unloaded and reloaded at the terminal, since it is expressly found by the Commission that in that case congestion will be a problem. Yet, the Commission has ordered the Embargo Notice of March 6 set aside in its entirety. We respectfully

request that the Commission clarify its Report in this respect - i.e., SACAL's right to embargo this traffic where it must be unloaded and reloaded at the terminal in view of the demonstrated congestion which will result, to the detriment of all users of their service.

We also respectfully request that the Commission reconsider their rejection (Report, pages 5/6) of SACAL's contention that their tariff does not authorize SACAL to unload and reload these trailers at their terminal; and that, therefore, to do so would violate section 2 of the Intercoastal Shipping Act.

The relevant rate itself (Attachment 3 to Responses of SACAL), is a flat rate per trailer, regardless of contents - $700 in the case of a 35-foot trailer, the equipment usually employed. The application of the rate (Attachment 2(a), ibid) is "on commodities in/on wheeled trailers" (Rule 1a.), "from place of rest at carriers loading terminal" (Rule 1b.). By the "spotting" rule (Attachment 2(d), ibid), carrier "will spot trailers -- for loading by shipper, and return loaded trailer to carrier's terminal;--."

This "holding out" is in no way ambiguous. For $700, the carrier spots the empty trailer, returns the trailer as loaded by the shipper to place of rest at carrier's terminal, and then loads the loaded trailer to their ship. No other terminal service

privilege or facility is held out. Quite clearly, to perform some other and additional terminal service, or to extend some other privilege or facility without tariff provision therefore would violate section 2 of the Intercoastal Shipping Act.

We have parsed every sentence on pages 5 and 6 of the Report, and have attempted, without success, to identify premises and conclusions. The Report says that "it is a penalty for handling NVO trailers"; that "it is the result of a labor dispute and arises from a collective bargaining agreement to which SACAL is not a party". But even so, the question <u>still</u> is whether "it" requires the performance of a terminal service - a privilege or facility - within the meaning of section 2, as quoted on page 5 of the Commission's report. If <u>in fact</u> "it" requires the performance of a terminal service, or the grant or allowance of a privilege or facility, then section 2 requires that the service, privilege or facility be specified in the tariff and, as already shown, SACAL's tariff specifies only the transportation of the loaded trailer, as loaded by the shipper.

Perhaps the reason for the Commission's dismissal of our argument is a belief that the unloading and reloading of the trailers is not a service, privilege or facility within the meaning of section 2. This clearly is indicated by the last sentences of

of a footnote on page 6

> "---. Moreover, it is an extremely dubious advantage to unload an already properly loaded trailer and reload it. In fact it is more in the nature of a disadvantage."

Generally speaking, this is a reasonable observation; and supports, rather than disproves, our contention that the unloading and reloading of the trailers is not within the holding out of SACAL's published rate. But in the circumstances here, the comment surely is very wide of the mark. We are dealing here with the traffic of a person who, by definition of this Commission, is a shipper only in their relationship with the "underlying" common carrier by water. Their business in fact is that of a common carrier by water. They receive the shipments of individual, real shippers at their own receiving stations, which they maintain at points away from the waterfront, and consolidate them for transportation in solid trailer lots. But for the fact that these common carriers by water maintain their receiving stations elsewhere, the traffic they handle is traffic which, in the original shipping package, would move over a waterfront pier or facility.

Now, a lawful Collective Bargaining Agreement requires that if traffic which otherwise would move over a waterfront facility in the original shipping package is consolidated into trailer lots elsewhere, those trailers must be unloaded and

reloaded at a waterfront facility. Therefore, as a cold, practical matter of fact, if these NVO common carriers by water are to meet their undertakings as common carriers by water they must either

(a) Remove their present receiving facilities to a waterfront facility;

(b) Arrange with the ILA to recognize their present facility as a waterfront facility; or,

(c) Find someone else to meet the requirement in their stead.

The fact is, then, that - far from a "dubious advantage" or a "disadvantage" - if SACAL unloads and reloads the NVO traffic at their facility and thus enables that traffic to meet the requirement of the Collective Bargaining Agreement, then SACAL performs for these NVO common carriers a very real service, extends to them a very real privilege or facility. And, since (1), section 2 of the Intercoastal Shipping Act requires that such a service, privilege or facility be separately stated in SACAL's tariff and, (2), no such service, privilege or facility is separately stated in SACAL's tariff, SACAL cannot lawfully perform the unloading and reloading.

Respectfully submitted,

SOUTH ATLANTIC & CARIBBEAN LINE, INC.

By: John Mason
RAGAN & MASON, their attorneys

John Mason
RAGAN & MASON
900 - 17th Street, N.W.
Washington, D. C.
April 9, 1969

[Certificate of Service Omitted in Printing]

FEDERAL MARITIME COMMISSION

DOCKET NO. 69-9

SOUTH ATLANTIC AND CARIBBEAN LINE, INC.

DENIAL OF PETITION OF SACL TO REOPEN FOR CLARIFICATION IN PART AND FOR RECONSIDERATION IN PART

By petition of April 9, 1969, South Atlantic and Caribbean Line, Inc. (SACL) has requested that we reopen this proceeding for clarification and reconsideration of our decision here. The Commission finds no need for clarification of its decision and, since nothing appears in the petition which has not already been considered in reaching its decision, no reconsideration is necessary. Therefore, the petition is denied.

By the Commission.

Thomas Lisi

Thomas Lisi
Secretary

(SEAL)

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23,118

SOUTH ATLANTIC & CARIBBEAN LINE, INC.,

Petitioner

v.

FEDERAL MARITIME COMMISSION AND THE
UNITED STATES OF AMERICA,

Respondents

BRIEF FOR PETITIONER

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*Cases or authorities chiefly relied upon are marked by asterisks.

IN THE

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BRIEF FOR PETITIONER

STATEMENT OF THE ISSUES

1. Must the Federal Maritime Commission, in administering the Shipping Act, 1916, and the Intercoastal Shipping Act, 1933, consider and accommodate the national policy expressed in the Labor Management Relations Act?

2. Whether a common carrier by water subject to the Shipping Act, 1916, and the Intercoastal Shipping Act, 1933, may lawfully embargo certain traffic which, pursuant to a lawful collective bar-

gaining agreement, the carrier must unload from and reload to highway trailers before loading the said highway trailer to its ship where:

a. by the act of unloading and reloading the trailer carrier performs a terminal service not provided for in the carrier's ocean freight tariff, and therefore in violation of the Intercoastal Shipping Act, 1933; and

b. the act of unloading and reloading the trailer at the terminal will compound existing congestion and disrupt service to all users of the carrier's service.

3. May the Federal Maritime Commission, under the Shipping Act, 1916, and the Intercoastal Shipping Act, 1933, compel a carrier to provide service to particular traffic where the carrier's refusal to provide service is *not* an undue or unreasonable preference, advantage, prejudice, or disadvantage within the meaning of Section 16, First, Shipping Act, 1916 (46 U.S.C. 815).

This case was not previously before this court under the same or similar title.

REFERENCE TO OPINION AND ORDER

The report and order here in issue was rendered by the Federal Maritime Commission in Docket No. 69-9 on April 4, 1969 (JA 1, 9), by the Federal Maritime Commission.

STATEMENT OF THE CASE

A. Nature of the Case

This proceeding concerns the validity under Section 2, Intercoastal Shipping Act, 1933 (46 U.S.C., Section 844), of an embargo imposed by South Atlantic & Caribbean Line, Inc. (hereinafter

"Petitioner"), and the validity of a cease and desist order issued by the Federal Maritime Commission (hereinafter "Commission") ordering Petitioner to cease and desist from carrying out its embargo.

B. Brief factual summary, course of the proceeding and disposition below

Petitioner is a common carrier by water serving *inter alia* the trade between Miami, Florida, and San Juan, Puerto Rico (JA 1).

On February 19, 1969, the International Longshoremen's Association (hereinafter "ILA") and the employers of longshoremen at the Port of Miami entered into a collective bargaining agreement, the provisions of which were made retroactive to October 1, 1968. Clause 19 of the agreement (JA 67) discussed more fully herein, requires that certain containers (highway trailers) loaded at points away from the waterfront must be stripped and stuffed by ILA labor at a waterfront facility before loading aboard the ship for ocean transportation. Failure to do so is a breach of the collective bargaining agreement for which liquidated damages in the amount of $250 per container, payable by the steamship carrier, is fixed.

Petitioner is not itself an employer of waterfront labor at Miami; its ships are stevedored and its cargo is received for shipment by an independent contractor, Eagle, Inc., an unrelated company. Petitioner did not take part in the negotiation of, and is not a party to, the collective bargaining agreement. Petitioner's ships must be loaded at the waterfront and the only source of labor available for that loading is ILA labor.

Because the act of stripping and stuffing the containers at Petitioner's already congested waterfront terminals would compound the existing congestion to the detriment of other users of Petitioner's service, and because performance of the act of stripping and stuffing

would violate the Intercoastal Shipping Act because no provision therefore is in Petitioner's ocean freight tariffs. Petitioner, on March 6, 1969, published an Embargo Notice (JA 10).

On March 7, 1969, the Commission served its order to show cause why Petitioner should not be ordered to cease and desist from carrying out its embargo. On March 11, 1969, Petitioner telegraphed the Commission requesting a clarification to the order to show cause to specify the provision or provisions of Petitioner's tariff allowing or requiring it to perform the additional terminal service of stripping and stuffing described in the Embargo Notice (JA 77). Also on March 11, 1969, Petitioner responded to the order to show cause (JA 33) and oral argument was had on March 13, 1969. By Report and Order issued April 4, 1969 (JA 19), Petitioner was ordered to cease and desist from enforcing its embargo and to carry the relevant traffic under its "existing tariff," that is, without stripping and stuffing. On April 9, 1969, Petitioner filed its Petition to Reopen for clarification in part and for reconsideration in part. By Commission report served April 16, 1969, the petition was denied.

Petitioner petitioned this court for review on June 3, 1969.

NARRATIVE OF RELEVANT FACTS

1. Petitioner is a common carrier by water between *inter alia* Miami, Florida, and San Juan, Puerto Rico. That operation is subject to the Shipping Act, 1916, and the Intercoastal Shipping Act, 1933, and the jurisdiction of the Commission.

2. As required by Section 2 of the Intercoastal Shipping Act, Petitioner publishes and files with the Commission, Federal Maritime Commission, freight tariffs (schedules), showing all of its rates, fares and charges for or in connection with the transportation Petitioner performs.

3. Petitioner operates roll-on, roll-off ships; they publish in their tariff (JA 1) freight rates of $700 per 35-foot highway trailer and $800 per 40-foot highway trailer from Miami to San Juan. Under this tariff publication, Petitioner "spots" Petitioner's highway trailers at the shipper's premises; the shipper loads the trailer; Petitioner transfers the trailer as loaded by the shipper from shipper's premises to Petitioner's marine terminal and there loads the trailer (without handling of the contents) to Petitioner's ship for transportation to San Juan where the loaded trailer is "spotted" at the consignees' premises for unloading by the consignee. Nothing in Petitioner's tariff allows or compels Petitioner to unload and reload the contents of trailers carried under these provisions (see also JA 77). The transportation so provided requires no covered or sheltered facilities at the marine terminal; the highway trailer itself protects the cargo (JA 69, JA 70).

4. Petitioner also publishes rates applicable to and carries so-called "break-bulk" cargo. This is cargo which shippers deliver to Petitioner's marine terminal in Miami in the original packaging. That package cargo is either loaded into trailers by Petitioner at the marine terminal (the trailer in turn being loaded aboard the ship for transportation to San Juan), or is loaded by Petitioner either in the original package or in small containers in appropriate areas of Petitioner's ship. This "break-bulk" package cargo requires a covered warehouse facility to protect the cargo from the elements and other transportation risks (JA 70, 71).

5. Petitioner's marine terminal operations at Miami are performed by Eagle, Inc., an unrelated company. The terminal facilities are operated by the Port of Miami, and Eagle has the right (in common with others) to utilize certain open storage areas for the marshalling and staging of loaded trailers, and has the right (in common with others) for the use of a covered transit warehouse.

The covered transit facilities available for the receipt and handling of Petitioner's "break-bulk" package traffic is inadequate to the requirements of its service. Attempts have been made to obtain additional warehouse space over several years but none is available. (JA 64-65); (JA 69-70, 71-72).

6. On February 19, 1969, retroactive in effect to October 1, 1968, the ILA and employers of longshoremen at the Port of Miami (hereinafter "Employers") executed a Deep Sea Longshore Agreement including, among other things, "Article 19. Containerization." This clause provides as follows:

> "(a) Containers owned or leased by employer-members (including containers on wheels) containing LTL loads or consolidated full-container loads which are destined for or come from, any person (includes a consolidator who stuffs containers of outbound cargo or a distributor who strips containers of inbound cargo) who is not the beneficial owner of the cargo, and which either comes from or is destined to any point within a 50-mile radius from the center of any ports covered by this agreement shall be stuffed and stripped by ILA labor at longshore rates on a waterfront facility." (JA 2).

Under the terms of this Deep Sea Longshore Agreement, any container which comes within the criteria of Clause 19 is to be unloaded (stripped) and reloaded (stuffed) by ILA labor at a waterfront facility, before the trailer (container) is loaded to the ship. The agreement states that the purpose of this provision is to "protect and preserve the work jurisdiction of longshoremen–." Failure to unload and reload such a trailer is a breach of the collective bargaining agreement, and liquidated damages are provided as follows:

> ". . . the steamship carrier shall pay to the Joint Welfare Fund liquidated damages of $250 per container which should have been stuffed and stripped." (JA 2) (JA 64) (JA 65-69).

7. Petitioner is not an employer of waterfront labor; did not take part in the negotiations leading to the agreement just described; and is not a party to the agreement. Petitioner's ships are stevedored by Eagle, Inc., an unrelated company. Eagle, Inc., is an employer of waterfront labor; did take part in the negotiations leading to the above collective bargaining agreement, and is a party to the same. Eagle stevedores the ships of other carriers, as well as those of Petitioner. Whether Petitioner employes the service of Eagle to load its ships or the services of some other stevedore or stevedores the ship itself, the only source of waterfront labor is the ILA. (JA 72, 73).

8. As relevant to Petitioner's operations, the traffic affected by this provision is the traffic of NVO's and shall hereafter be referred to as NVO traffic.

9. An NVO is a non-vessel operating common carrier by water. It assembles shipments which are consolidated for shipment over the underlying common carrier by water (the Petitioner) as a full trailer lot. Such an NVO is subject to all the obligations and responsibilities of a common carrier yet its relationship to the water carrier is that of a shipper (*Bernhard Ulmann Co., Inc. v. Puerto Rico Express Co.*, 3 F.M.C. 771 (1952)). In Miami, the NVO's receive shipments at stations away from the waterfront and there load the consolidated shipments into trailers for shipment under Petitioner's flat per trailer rates heretofore described.

10. The value of the NVO operation to Petitioner's service is that it removes the handling of packaged goods from Petitioner's already congested marine terminal to the receiving stations of the NVO at points away from the waterfront, that is to say, out of the work jurisdiction of the ILA. Petitioner considered (JA 34) in the circumstances that the provision of the collective bargaining agree-

ment was a lawful one since, but for the operation of the NVO's at points away from the waterfront, that cargo would be received at and loaded into trailers at the waterfront within the jurisdiction of the ILA (JA 34) (JA 74, 75).

11. The work of stripping and stuffing the trailer must be done under cover. Because the covered terminal facilities available to Petitioner were already congested and inadequate to Petitioner's operations (JA 64; JA 71), and because attempts to strip and stuff the relevant trailers in that already congested area would detriment all users of Petitioner's services causing denial and limitation of service available to them, Petitioner on March 6, 1969, issued its Embargo Notice notifying the shipping public that it would not book or transport trailers which, pursuant to the collective bargaining agreement, must be stripped and stuffed at the marine terminal (JA 31). The Embargo Notice also recited the additional liabilities that stripping and stuffing would impose upon Petitioner and, in response to the Show Cause Order of the Federal Maritime Commission, Petitioner added the further grounds that in stripping and stuffing the relevant trailers Petitioner would be performing a service not provided in its tariff and therefore would be in violation of Section 2 of the Intercoastal Shipping Act, 1933, as amended (JA 33).

12. On March 7, 1969, the Commission served its order to show cause why Petitioner should not be ordered to cease and desist from carrying out its embargo (JA 15). The Commission thereafter ordered Petitioner to cease and desist from enforcing its embargo. (JA 1-8; 9).

SUMMARY OF ARGUMENT

I

Although Petitioner's embargo was premised upon the congestion resulting from and other consequences of the *act* of stripping and stuffing the trailers at Petitioner's terminal, the Federal Maritime Commission did not reach those premises but instead held that Petitioner was required by the Intercoastal Shipping Act, 1933, to book and carry the relevant trailers pursuant to Petitioner's "existing tariff," *i.e.*, without stripping and stuffing the trailers, and therefore in breach of a lawful collective bargaining agreement. Petitioner contends that the Commission's Report and Order does not consider and accommodate the national policy of the Labor Management Relations Act; that the Commission errs in ordering Petitioner to breach or to cause their stevedores to breach the collective bargaining agreement without concern as to whether the agreement is a valid exercise of rights secured by the National Labor Relations Management Act.

II

That the embargo is a lawful one because:

(a) Terminal congestion is a lawful reason for embargo; and the act of stripping and stuffing the relevant trailers at the limited marine terminal facilities would compound an already existing congestion; and

(b) The act of stripping and stuffing the trailers is a service within the meaning of Section 2 of the Intercoastal Shipping Act for which service there is no provision in Petitioner's ocean freight tariff; the performance of the act of stripping and stuffing without

provision therefore in the tariff is a violation of Section 2 of the Intercoastal Shipping Act, 1933, which would subject Petitioner to civil fines.

III

That absent undue or unreasonable preference, advantage, prejudice, or disadvantage within the meaning of Section 16, First, Shipping Act, 1916, a carrier subject to that Act and to the Intercoastal Shipping Act, 1933, may decline to provide service, and that the Federal Maritime Commission is without authority to compel the carrier to provide the service.

APPLICABLE STATUTES

Section 2, Intercoastal Shipping Act, as amended (46 U.S.C., Section 844), provides *inter alia:*

> "Every common carrier by water in intercoastal commerce shall file with the Federal Maritime Board (Commission) and keep open to public inspection schedules showing all the rates, fares, and charges for or in connection with transportation between intercoastal points on its own route; . . . the schedules filed, and kept open to public inspection . . . and shall also state separately each terminal or other charge, privilege, or facility, granted or allowed, and any rules or regulations which in anywise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, or charges or the value of the service rendered to the passenger, consignor or consignee . . .
>
> "Nor shall any common carrier by water in intercoastal commerce charge or demand or collect or receive a greater or less or different compensation for the transportation of passengers or property or for

any service in connection therewith than the rates, fares, and/or charges which are specified in its schedules filed with the Federal Maritime Board and duly posted and in effect at the time; nor shall any such carrier refund or remit in any manner or by any device any portion of the rates, fares, or charges so specified, nor extend or deny to any person any privilege or facility, except in accordance with such schedules."

"Whoever violates any provision of this Section shall be liable to a penalty of not more than $1,000 for each day such violation continues, to be recovered by the United States in a civil action."

Section 16, First, Shipping Act, 1916 (46 U.S.C. 815), provides:

"It shall be unlawful for any common carrier by water, or other person subject to this chapter, either alone or in conjunction with any other person, directly or indirectly—

"First. To make or give any undue or unreasonable preference or advantage to any particular person, locality, or description of traffic in any respect whatsoever, or to subject any particular person, locality, or description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: . . ."

ARGUMENT

THE COMMISSION DID NOT CONSIDER, AND ACCOMMODATE, THE NATIONAL POLICY OF THE LABOR MANAGEMENT RELATIONS ACT; THEY ARE REQUIRED TO DO SO.

The stated purpose of the collective bargaining agreement provision for the stripping and stuffing of the relevant trailers at the waterfront is

". . . to protect and preserve the work jurisdiction of longshoremen—."

The right of workers to protect their work jurisdiction is secure. *National Woodwork Manufacturers Association v. NLRB*, 386 U.S. 612, 19 L.Ed.2d 357 (1967); *American Newspaper Publishers Association v. NLRB*, 345 U.S. 100, 106, 97 L.Ed. 852, 73 Supreme Court 552, 31 A.L.R.2d 947; *International Union of Electrical Workers v. NLRB*, 366 U.S. 667, 6 L.Ed.2d 592; *United Steel Workers of America v. NLRB*, 376 U.S. 492, 11 L.Ed.2d 863. Here the value of the NVO service to Petitioner is that the NVO service does remove from the waterfront the receiving of package cargo and the loading of that package cargo into trailers for ocean shipment by Petitioner's ships; in removing that work from the waterfront, the work necessarily is removed from the "jurisdiction of the longshoremen." In those circumstances Petitioner did not consider (and does not now consider) that the measure adopted by the Employers and the ILA at Miami is unlawful.

Petitioner, therefore, considers that it is obliged by a lawful collective bargaining agreement to strip and stuff these trailers at the waterfront before loading them to their ship. If that was all that is involved, Petitioner would simply comply by performing the act of stripping and stuffing the trailers before loading the trailers to the ship. But there are other considerations and intervening causes. The Embargo Notice of March 6, 1969, expressly recites that it is the *act* of stripping and stuffing the trailers at the marine terminal which, added to the already existing congestion, will disrupt service and be a detriment to other users; and that it is the added liabilities which the carrier must assume in consequence of the *act* of stripping and stuffing that compels the embargo. In its response to the Commission's Show Cause Order, Petitioner added the further ground that performing the *act* of stripping and stuffing would violate the Intercoastal Shipping Act, 1933, because (see *post*) their tariff does not provide for that service.

However, the Commission in their Report did not reach the premises upon which the embargo rested, *i.e.*, the physical congestion and other consequences of the *act* of stripping and stuffing the trailers at the marine terminal. Instead, the Commission held that Petitioner was required to (F.M.C. Rept.; JA 6)

> ". . . accept and carry all cargo tendered to it under the terms and conditions of its existing tariffs."

That is to say, that Petitioner must breach the lawful collective bargaining agreement, and load these trailers without stripping and stuffing the contents.[1] The Commission in saying (F.M.C. Rept., JA 5) that Petitioner is under "no existing physical disability to carry the cargo in question" clearly *meant* that Petitioner is under no physical disability to carry the cargo *without* first stripping and stuffing, for they also recited (F.M.C. Report, JA 3) that:

> "Intervenors . . . admit that if the ILA does insist upon unloading and reloading their contents, SACAL's facilities would not be adequate."

There is little doubt but that the Commission at the least ignored the national policy of the Labor Management Relations Act. They said (F.M.C. Rept., JA 6 and JA 7) that they are not "concerned" with and do not "reach" the validity of the collective bargaining agreement. They also said (F.M.C. Rept., JA 6) that:

> ". . . *whatever its validity*, we cannot permit the mere execution of a collective bargaining agreement to override the clear requirements of a statute which we are charged to administer." (Emphasis added)

---

[1] As a practical matter this means that Petitioner must somehow compel their independent contractor stevedore to breach the agreement. Petitioner's stevedore is a party to that agreement; and stevedores the ships of other carriers as well as those of Petitioner.

And again, (JA 8):

> "... Although the Commission cannot deal with the new labor contract which is the immediate source of this condition, we can deal with those persons affected by it and within our jurisdiction. In that posture we do not intend to permit disruptions of our water borne foreign or domestic offshore commerce. ..."

The Commission indeed goes further than to simply ignore the national policy of the Labor Management Relations Act because, by requiring Petitioner to perform the transportation in breach of the lawful collective bargaining, they actively thwart the collective bargaining agreement.

That is, we say, error. Just as this Commission in administering the acts under their jurisdiction must consider and accommodate the national policy expressed in the anti-trust statutes,[2] so, too, they must consider and accommodate the national policy of other acts of Congress including in particular the Labor Management Relations Act. See *McLean Trucking Company v. United States*, 321 U.S. 67, 79; 88 L.Ed. 544, 522/553 (1944), as follows:

> "... The Interstate Commerce Commission's task is to enforce the Interstate Commerce Act and other legislation which deals specifically with transportation facilities and problems. That legislation constitutes the immediate frame of reference within which the

---

[2] *Volkswagenwerk Aktiengesellschaft v. Federal Maritime Commission*, 390 U.S. 261, 99 S.Ct. 929, 19 L.Ed.2d 1090 (1968); *Federal Maritime Commission v. Aktiebologet Svenska America Linien*, 390 U.S. 238, 88 S.Ct. 1005, 19 L.Ed.2d 1071 (1968); *Matson Navigation Co. v. Federal Commission*, 405 F.2d 796 (9th Cir. 1968); *Sabre Shipping Corp. v. American President Lines, Ltd.*, 285 F.Supp. 949 (S.D.N.Y. (1968)); *Mediterranean Pools Investigation*, 6 S.R.R. 975 (F.M.C. 1966).

> Commission operates; and the policies expressed in it must be the basic determinants of its action.
>
> "But in executing those policies the Commission may be faced with overlapping and at times inconsistent policies embodied in other legislation enacted at different times and with different problems in view. When this is true, it cannot, without more, ignore the latter. The precise adjustments which it must make, however, will vary from instance to instance depending on the extent to which Congress indicates a desire to have those policies leavened or implemented in the enforcement of the various specific provisions of the legislation with which the Commission is primarily and directly concerned. . . ."

Of course the Commission is concerned about disruption of commerce within the ambit of the statutes they administer, but what they overlook is that the doors at the National Labor Relations Board swing open just as wide as the doors at the Federal Maritime Commission (and, in the circumstances of this case, to better purpose). If any provision of any collective bargaining agreement *unlawfully* disrupts commerce, including the water borne foreign and domestic offshore commerce, there are remedies available at the National Relations Board. In the same way, if the ILA by this provision has overreached itself, and if Petitioner has erred in complying with the provisions of the collective bargaining agreement, again remedies are available at the National Labor Relations Board.

As they say, this Commission cannot determine the validity of the collective bargaining agreement; but for the Commission to order Petitioner to carry this traffic without stripping and stuffing the trailers, in breach of the collective bargaining agreement, without even "concern" as to whether that agreement is a valid exercise of rights assured by the Labor Management Relations Act is clear error.

Petitioner's Embargo Is for a Lawful Purpose and the Commission Order Requiring Petitioner To Cease and Desist from Enforcing Its Embargo Notice Is in Error.

As we have shown, in terms of proximate cause Petitioner's embargo was necessitated not *per se* by the fact that Miami Employers and the ILA entered into the agreement but (1) because of the intervening fact that Petitioner's marine terminal facilities are limited, are already overtaxed and the act of stripping and stuffing the relevant traffic at that terminal would intolerably disrupt Petitioner's service to all users and (2) because Petitioner could not, because of the requirements of the Intercoastal Shipping Act, lawfully perform the act of stripping and stuffing.

If the Commission correctly held that Petitioner (and the Commission) must ignore the collective bargaining agreement, and Petitioner somehow must compel his independent contractor—a party to the collective bargaining agreement—to load the trailers to Petitioner's ship without first stripping and stuffing them, then obviously the consequences of the act of stripping and stuffing would not arise. Lacking these consequences, there would be no occasion to embargo.

We, therefore, proceed to the defense of the embargo on the premise that the Commission erred in ignoring, even thwarting, the collective bargaining agreement and that Petitioner lawfully predicated the embargo on the consequences of complying with the collective bargaining agreement, *i.e.*, the consequences of performing the stripping and stuffing.

1. *Congestion:* There is no factual dispute that the congestion exists. As the Commission's Report (p. 3) recites:

> "Intervenors just as readily admit that if the ILA does insist upon unloading and reloading their con-

> tainers, SACL's facilities would not be adequate. In other words, congestion is not a problem unless the ILA insists upon unloading and reloading the NVO trailers. . . ."

The right of a common carrier by water to embargo in order to avoid or lessen congestion is well settled. *Holt Motor Co. v. Nicholson Universal SS Co.*, 56 F.Supp. 585; *District Court D.C. v. Minnesota* (July 1, 1944); *Boston Wool Trade Association v. Merchants & Miners Trans. Co.*, 1 U.S.S.B. 32, 33 (Dec. 13, 1921); *Helmly Furniture v. Merchants & Miners Trans. Co.*, 1 U.S.S.B. 132.

It is the fact of congestion that is lawful justification for an embargo; whether the fact of congestion in turn is caused by nature, or an overwhelming demand for shipping service, or from compliance by the carrier with a lawful collective bargaining agreement, or a combination of any or all of these things, is immaterial.

2. *The Requirement of the Intercoastal Shipping Act.* Moreover, the embargo is lawful for the added reason that it is in aid of the Commission's jurisdiction under the Intercoastal Shipping Act, 1933. That Act by Section 2 (46 U.S.C. 844), requires that common carriers subject to it publish and file with the Federal Maritime Commission a schedule of rates, etc. (an Ocean Freight Tariff), which shall:

> ". . . state separately each terminal or other charge, privilege, or facility, granted or allowed, and any rules or regulations which in any wise change, affect, or determine any part of the aggregate of such aforesaid rates, fares, or charges, or the value of the service rendered. . . ."

Section 2 also provides that the carrier shall not:

> "*extend* or deny *to any person any privilege or facility*, except in accordance with such schedules." (Emphasis added)

Petitioner's ocean freight tariff contains no provision extending, or which would permit them to extend, to the shippers of this relevant traffic the act of stripping and stuffing these trailers.[3]

It may be noted that by footnote to the report (JA 7), the Commission says:

> "Moreover, it is an extremely dubious advantage to unload a properly loaded trailer and reload it. In fact, it is more in the nature of a disadvantage."

It may well be that the gratuitous act of stripping and stuffing an already properly loaded trailer is a disadvantage, not an advantage; a disservice, not a service, but it is certainly clear *that given a lawful requirement* that a properly loaded trailer be unloaded and reloaded, then the *act* of doing so is an advantage to and a service to the shipper. Compare *Colonialgrossisternes Forening v. Moore-McCormack Lines, Inc.*, 178 F.2d 288 (1949). Standing alone, the return to New York of cargo that had been shipped from New York to Norway was not a service to the cargo. But given the requirement (war conditions) that something be done with the goods, the Second Circuit held that the return of the goods to New York was a "service" for which, under the contract, additional compensation was lawfully charged.

There being a lawful requirement that these trailers be stripped and stuffed, the act of stripping and stuffing is a service within the meaning of Section 2 of the Intercoastal Shipping Act.

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[3]Both by telegraphic petition for clarification in advance of the Show Cause proceedings (JS 77) and by petition to reopen after decision (JA 79), Petitioner sought to have the Commission specify any provision of Petitioner's freight tariff which, in the Commission's judgment, would allow or require Petitioner to perform the act of stripping and stuffing these trailers, but without success.

"It cannot too strongly be stressed that every transportation service, or service in connection therewith, must be clearly shown in the tariff before a carrier may lawfully engage therein, and this applies with equal force to service for which a charge is made as well as to services for which no charge is made; and that failure to properly publish, file and post all the rates and charges for or in connection with transportation and rules which in anywise change, affect or determine any part of such rates or charges is as serious a violation of law as the failure to observe strictly such rates or charges after they have been properly published or filed. A penalty is prescribed by law as heavy for one violation as for the other. . . ." *Intercoastal Investigation*, 1935, 1 U.S.S.B. 400, 447.

The Purpose and Effect of the Commission's Order Is To Compel Petitioner To Transport the Embargoed Traffic. There Being No Violation of Section 16, First, the Commission Is Not Authorized To Compel a Carrier To Provide Service.

The Intercoastal Shipping Act, 1933, requires only that a common carrier operating within its scope publish and file with the Commission schedules of rates and charges for the service the carrier performs; charge only the rates and charges so published for performing that service; and (Section 3) provides authority for the Commission after notice and hearing to fix just and reasonable rates or charges.

It is unlike the Interstate Commerce Act and the Federal Aviation Act because it neither shelters the carrier from excessive competition, through a public convenience and necessity provision, nor does it impose upon the carrier the duty of providing service. That

the tariff filing requirements of the Intercoastal Shipping Act are not authority to the agency to compel a carrier to provide service has been precisely decided. See *McCormack SS Company v. United States*, 16 F.Supp. 45 (1936) where the review court reversed an order of the agency (*Intercoastal Rates to and from Berkeley and Emeryville*, 1 U.S.S.B. 510) where, by suspending certain tariff publications, the agency would have compelled service between ports the carrier no longer wished to service. The review court (*ibid.* p. 48) said:

> "In interpreting phrases of acts of Congress regulating shipping, which are said to create in the bureau (Commission's predecessors) the power to compel the steamship line to remain in the service of a certain port without granting to that company a similar protection against competitors who could take from it the business it had developed, the delegation of such power would have to be made in terms so clear that there is no possible ambiguity or doubt as to such intent."

The present case involves not the refusal of a carrier to service a port, but to carry particular traffic which, because it must be unloaded from trailers and reloaded into trailers at already congested marine terminals, would adversely affect the service which the carrier is able to offer users generally. The Commission by ordering Petitioner to carry this traffic is effectively ordering the carrier to provide service, a duty which the Intercoastal Shipping Act does not place upon Petitioner and an authority which the Intercoastal Shipping Act does not give to the Commission.

This is not to say that a carrier may refuse service under circumstances which amount to an unjust or unreasonable preference, advantage, prejudice or disadvantage within the meaning of Section 16, First, Shipping Act, 1916. Here the carrier, to provide the

transportation, must extend to that traffic terminal service which it does not extend to other shippers of trailer traffic.

CONCLUSION

WHEREFORE, your Petitioner prays that this honorable court reverse the Report and Order of the Commission, Federal Maritime Commission, and find:

1. That it is unlawful for the Federal Maritime Commission to order a person subject to its jurisdiction to breach a lawful collective bargaining agreement;

2. The Respondent, Federal Maritime Commission, in administering the Shipping Act, 1916, and the Intercoastal Shipping Act, 1933, must consider and accommodate the national policy of the Labor Management Relations Act;

1. That Petitioner's embargo of March 6, 1969, is lawful in that the purpose of the embargo is to prevent or alleviate congestion on Petitioner's marine terminal;

4. That Petitioner's embargo of March 6, 1969, is lawful in aid of the jurisdiction of the Federal Maritime Commission since Petitioner is prohibited by the Intercoastal Shipping Act of 1933 from performing the act of stripping and stuffing the embargoed traffic; and

5. That Petitioner's refusal by embargo to receive and carry trailers containing traffic which must be stripped and stuffed at Petitioner's marine terminal, has not been shown after notice and hearing to be and is not a violation of Section 16, First, of the Shipping Act, 1916; and that the Commission, Federal Maritime Commission, therefore, is without authority to compel Petitioner to perform the transportation.

AND, for such other and further relief as this court deems reasonable and proper in the premises.

Respectfully submitted,

JOHN MASON
BRADLEY R. COURY
Attorneys for Petitioner

DATED: August 25, 1969

BRIEF FOR RESPONDENTS

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23,118

SOUTH ATLANTIC AND CARIBBEAN LINE, INC.,

Petitioner,

v.

FEDERAL MARITIME COMMISSION
and UNITED STATES OF AMERICA,

Respondents.

ON PETITION TO REVIEW AN ORDER
OF THE FEDERAL MARITIME COMMISSION

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U.S. Department of Justice

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October 15, 1969

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Commission

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TABLE OF AUTHORITIES

* Cases principally relied upon.

STATEMENT OF THE ISSUE

Where a common carrier had placed an embargo on containers subject to the provisions of a new collective bargaining agreement, there being no provision in the carrier's tariff to exempt it from carrying such containers and their being no ground to justify a valid embargo, the issue in the opinion of respondents is:

> Whether or not the Commission properly found and ordered Petitioners to cease and desist from imposing an unlawful embargo.

This case has not been before this Court under the same or similar title.

REFERENCE TO RULING

Report and order of the Federal Maritime Commission, FMC Docket No. 69-9, South Atlantic and Caribbean Line, Inc. - Order to Show Cause, served April 4, 1969, reported in Pike and Fischer Shipping Regulation Reports, 10 S.R.R. 997 (set out fully in Joint Appendix at pages 1-9)..

COUNTERSTATEMENT OF THE CASE

Petitioner, South Atlantic and Caribbean Line, Inc. (SACL), has sought review of an order of the Federal Maritime Commission (Commission) issued in South Atlantic and Caribbean Line, Inc. - Order to Show Cause, Docket No. 69-9, decided April 4, 1969. (J.A. 9). The Commission ordered Petitioner to cease and desist from imposing an embargo on certain containerized cargo, since it had not demonstrated a sufficient reason to be relieved of its tariff obligations under section 2, Intercoastal Shipping Act, 1933 (46 U.S.C. 844). (J.A. 9). Jurisdiction to review orders of the Federal Maritime Commission rests on 28 U.S.C. 2342(3).

Petitioner herein, SACL, is a common carrier by water which serves the trade, among others, between Miami, Florida and San Juan, Puerto Rico. In accordance with section 2, Intercoastal Shipping Act, 1933 (46 U.S.C. 844) it has a tariff covering this trade on file with the Commission.

Intervenors, Transconex, Inc. and United Freightways Corp., conduct operations as consolidators of small shipments. They operate under a classification known as non-vessel operating common carriers (NVO's).[1/] As such, they also have tariffs on file with the Commission. Both intervenors use SACL vessels to transport their cargo.[2/] (J.A. 2).

1/ A Non-Vessel Operating Common Carrier is a classification for persons holding themselves out to provide the services of consolidating small shipments. They own no vessels but use the vessels of other (underlying) common carriers. Their relationship with a shipper is the same as any common carrier and, as such, they are required to file tariffs with the Commission. When dealing with the underlying common carrier, the NVO assumes the status of a shipper. Determination of Common Carrier Status, 6 F.M.B. 245 (1961).

2/ Although another NVO participated below, only Transconex and United Freightways have sought to intervene here.

As a result of the longshoremen strike, which occurred earlier this year, the International Longshoremen Association (ILA) and the employers of longshore labor on February 19, 1969 entered into a new collective bargaining agreement. One provision in this agreement, Clause 19, was aimed at containers loaded by NVO's at inland points (not serviced by ILA labor). The provision in substance required that on arrival at the pier such containers shall be unloaded and reloaded (stripped and stuffed) by ILA labor. Otherwise, the carrier must pay liquidated damages in the amount of $250.00 per container into the union welfare fund. 3/

SACL by letter immediately requested the ILA to defer enforcement of Clause 19 until it could amend its tariff on file with the Commission.

3/ Clause 19 provides:

> (a) Containers owned or leased by employer-members (including containers on wheels) containing LTL loads or consolidated full-container loads, which are destined for or come from any person (including a consolidator who stuffs containers of outbound cargo or a distributor who strips containers of inbound cargo and including a forwarder, who is either a consolidator of outbound cargo or a distributor of inbound cargo) who is not the beneficial owner of the cargo, and which either comes from or is destined to any point within a 50 mile radius from the center of any of the ports covered under this Agreement shall be stuffed and stripped by ILA labor at longshore rates on a waterfront facility under the terms and conditions of the General Cargo Agreement.

Rule 3(e) of the Clause provides:

> Failure to stuff or strip a container as required under these rules will be considered a violation of the contract between the parties. Use of improper, fictitious or incorrect documentation to evade the provisions of Rule 2 shall also be considered a violation of the contract. If for any reason a container is no longer at the waterfront facility at which it should have been stuffed or stripped under the rules then the steamship carrier shall pay to the joint Welfare Fund liquidated damages of $250 per container which should have been stuffed or stripped.

The letter noted that SACL would attempt to receive special permission to amend its tariff without waiting the required 30 days.[4/] (J.A. 61).

During the period here involved, the ILA had not sought to enforce Clause 19 and SACL had carried containers subject to the Clause after the agreement went into effect. In no case did it strip and stuff or pay liquidated damages. SACL did not seek to amend its tariff until March 19, 1969, and it did not request special permission at that time to advance the effective date. Hence, its tariff amendment, which excludes NVO tendered containers, did not go into effect until after the Commission's decision here under review.[5/]

A verified statement by Transconex discloses that in February 1969, which was after the strike, but prior to any enforcement of Clause 19, SACL called a meeting of its NVO customers in the Miami area. (J.A. 20). SACL advised that they would be required to sign letters of indemnification for cargo subject to Clause 19.[6/] Intervenor, Transconex, signed such letter.

On March 4, 1969, a representative of Transconex met with a SACL representative and advised him:

> That Transconex could no longer sign any letter of indemnification since it was not provided for in SACAL's tariff and, furthermore, if SACAL sought to enforce the letter of indemnification, Transconex could not recoup any additional cost from its customers since it had no provision in its tariff for such charges. (J.A. 22).

According to Transconex, SACL then refused to provide equipment until the letter of indemnification was signed. (J.A. 22). At this point Transconex filed a letter of protest with the Commission.

4/ Section 2, Intercoastal Shipping Act, 1933, provides that changes in a tariff cannot go into effect until 30 days after filing. However, the section also provides that the Commission may in its discretion and for good cause allow changes to take effect in less than 30 days.

5/ The substance of that amendment is the subject of another Commission proceeding -- FMC Docket No. 69-17.

6/ The record does not disclose whether the other NVO's signed such letters.

The Commission by telegram on March 5, 1969 informed SACL of the doubtful legality under section 2, Intercoastal Shipping Act, 1933, of a requirement of indemnification since nothing in SACL's tariff provided for such indemnity. (J.A. 12).

SACL on March 6, 1969 filed with the Commission an "embargo notice" which by its terms was to become effective immediately. (J.A. 10). The notice in substance stated that SACL would no longer accept cargo subject to Clause 19. It also contained a proviso under which SACL would carry Clause 19 cargo if the ILA would not require stuffing and stripping or if the shipper would indemnify SACL for the $250 liquidated damages. This proviso was deleted by SACL upon being advised by a Commission staff member that it was of doubtful validity apparently because it constituted a condition of carriage which was not set forth in the tariff as required by section 2, Intercoastal Shipping Act, 1933. (J.A. 13).

The Commission by letter of March 7, 1969 rejected the embargo notice itself on the ground that it purported to be an amendment to a tariff and as such it was not in compliance with section 2 which requires 30 days notice. (See n. 4, supra). (J.A. 14).

Notwithstanding the Commission's rejection, SACL put its embargo into effect. On March 7, 1969, the Commission issued its order to show cause why SACL should not be ordered to cease and desist from carrying out its embargo. (J.A. 15).

After the submission of affidavits, and memoranda of law and after oral argument, the Commission on April 4, 1969 issued its final order and report. (J.A. 1). It found that SACL's embargo was unlawful since the grounds

for a valid embargo did not exist. SACL could not, therefore, exclude Clause 19 cargo without a valid tariff amendment in conformity with law. Without such amendment, SACL as a common carrier was required to conform to its existing tariff obligations. The Commission did note, however, that SACL could have requested special permission to waive the 30-day time requirement and that such permission would have been granted.

SUMMARY OF ARGUMENT

A common carrier by water subject to the Intercoastal Shipping Act, 1933, is required to carry for all to whom it holds itself out in its tariff. It can only be relieved of this duty by a valid tariff amendment filed and published in accordance with the requirements of the statute, except that in an emergency situation where port congestion, acts of God or the lack of facilities prevent the carrier from complying with its tariff obligation, it may temporarily, if properly justified, impose an embargo.

Here, petitioner not having attempted a lawful tariff amendment placed an embargo on certain containers which it holds itself out to carry in its tariff. Such embargo was not properly justified since no congestion or other circumstances which would justify an embargo existed. Petitioner's argument that congestion will be caused by the stripping and stuffing requirement of the new collective bargaining Agreement cannot justify an embargo since the union had not sought to enforce the requirement. This fact renders premature almost every argument set forth by petitioner.

Even assuming that the union had sought enforcement, the Commission's order will not require petitioner to violate section 2 of the Intercoastal Shipping Act since until a valid tariff amendment is filed the petitioner holds itself out to carry containers for all shippers. The fact that it may have to provide an added service and absorb the costs will not put it in violation of section 2 since that statute is intended to protect shippers from hidden charges and unfair treatment. It is not designed to allow a carrier to avoid a tariff obligation because the particular service for which it provides is not separately stated in its tariff.

Again assuming that the union had sought enforcement of the requirement, the Commission's order will not require petitioner to violate the Labor Management Relations Act since petitioner's existing tariff required it to provide the stuffing and stripping services.

Finally, the Commission has not compelled any service but has merely required petitioner to adhere to its existing tariff until a valid amendment becomes effective.

ARGUMENT

THE COMMISSION PROPERLY FOUND AND ORDERED PETITIONER TO CEASE AND DESIST FROM IMPOSING AN UNLAWFUL EMBARGO.

A. Duty of a Common Carrier to Adhere to Its Tariff and the Requisites for release therefrom.

The fundamental duty of a common carrier is to carry for all to whom it holds itself out without discrimination.[7/] Common carriers subject to regulation under the Intercoastal Shipping Act, 1933, are required to exercise this duty pursuant to tariffs filed and published which precisely define the carrier's undertaking.[8/] Carriers operating under such tariffs can

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7/ In The Wildenfels, 161 Fed. 864, 866 (2d Cir. 1908), the duty of the common carrier at common law was described:

> According to all the authorities, the essential characteristics of the common carrier are that he holds himself out as such to the world; that he undertakes generally, and for all persons indifferently, to carry goods and deliver them, for hire. . . .

See also, Propeller Niagara v. Cordes et al., 62 U.S. 7 (1858).

8/ Section 2 (46 U.S.C. 844) provides in part:

> That every common carrier by water in intercoastal commerce shall file with the Federal Maritime Board and keep open to public inspection schedules showing all the rates, fares, and charges for or in connection with transportation between intercoastal points on its own route . . . .The schedules filed, and kept open to public inspection as aforesaid by any such carrier shall plainly show the places between which passengers and/or freight will be carried, and shall contain the classification of freight and of passenger accommodations in force, and shall also state separately each terminal or other charge, privilege, or facility, granted or allowed, and any rules or regulations which in anywise change, affect, or determine any part of the aggregate of such aforesaid rates, fares, or charges, or the value of the service rendered . . . .

* * *

[Footnote No. 8 continued on page .]

only be relieved of their obligation or holding out in one of two ways. The first method is by a valid tariff amendment. Section 2, Intercoastal Shipping Act, 1933, provides that such tariff amendments cannot go into effect until 30 days after filing with the Commission. A carrier can, however, for good cause, request the Commission to grant special permission to allow an amendment to take effect earlier. The granting of such permission is within the Commission's discretion. Pending the effective date of such amendments, a carrier is required to adhere to its tariff then in effect.[9/]

The second way in which a carrier may be relieved of its tariff obligation is by a lawful embargo. An embargo is nothing more than a temporary

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8/ Continued.

> No change shall be made in the rates, fares, or charges, or classifications, rules, or regulations, which have been filed and posted as required by this section, except by the publication, filing, and posting as aforesaid of a new schedule or schedules which shall become effective not earlier than thirty days after date of posting and filing thereof . . . Provided, That the board may, in its discretion and for good cause, allow changes upon less than the period of thirty days herein specified . . . .
>
> * * *
>
> [no] person shall engage in transportation as a common carrier by water in intercoastal commerce unless and until its schedules as provided by this section have been duly and properly filed and posted; nor shall any common carrier by water in intercoastal commerce charge or demand or collect or receive a greater or less or different compensation for the transportation of passengers or property or for any service in connection therewith than the rates, fare, and/or charges which are specified in its schedules filed with the board and duly posted and in effect at the time . . . .

9/ Such regulated carriers cannot even abandon service prior to the effective date of their tariff amendments. Embargo on Cargo, North Atlantic and Gulf Ports, 2 U.S.M.C., 464 (1940).

release from the requirements of a carrier's tariff.[10] The relief is for emergency situations and in all cases must be properly justified.[11] Because of the emergency nature of the embargo, the grounds for justification are limited to cases where a carrier cannot physically handle the cargo to be shipped. Thus, port congestion, acts of God or the lack of vessels or space have been held to be valid grounds for justifying the imposition of an embargo.[12] Mere financial loss by a carrier has not been held a sufficient ground to justify an embargo.[13]

B. Requisites for release from the duty lacking here.

The abandonment of service by SACL in this case was as the Commission found improper. First, SACL did not file, or attempt to file a tariff amendment. Had it desired not to wait the full 30 days for the provision to go into effect, it could have requested special permission for waiver of the 30 days. That SACL was aware of the provision allowing for special

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10/ Boston Wool Trade Association v. Merchants and Miners Transportation Co., 1 U.S.S.B. 32 (1921); Order that A.H. Bull SS. Co. Show Cause, 7 F.M.C. 133 (1962); Powell-Myers Lumber Co. v. St. L., I.M. and S. Ry., 45 I.C.C. 594 (1917).

11/ Holt Motor Co. v. Nicholson Universal SS Co., 56 F.Supp. 585 (D. Minn. (1944); Boston Wool Trade Association v. Merchant and Miners Transportation Co., supra; Order that A.H. Bull SS. Co. Show Cause, supra; New York Central RR. Co. v. U.S., 201 F.Supp. 958 (S.D.N.Y. 1962); Powell-Myers Lumber Co. v. St. L., I.M. and S. Ry., supra.

12/ Boston Wool Trade Association v. Merchants and Miners Transportation Co., supra; Holt Motor Co. v. Nicholson Universal SS Co., supra; In the Matter of Embargo on Iron and Steel Articles, 1 U.S.M.C. 674 (1937); Embargo on Camden, N.J., 2 U.S.M.C. 491 (1941).

13/ Order that A.H. Bull SS Co. Show Cause, supra; Embargo on Cargo, North Atlantic and Gulf Ports, 2 U.S.M.C. 464 (1940); New York Central RR. Co. v. U.S., supra; New Orleans Traffic & Transportation Bureau v. Mississippi Valley Barge Line Co., 280 I.C.C. 105, 117 (1951).

permission is clear from the letter it put into the record requesting the ILA to defer enforcement of Clause 19. (J.A. 61). In that letter SACL's Vice President stated:

> We have . . . instructed our attorney in Washington to prepare and file with the Federal Maritime Commission, obtaining special permission to do so upon less than 30 days notice if possible, amendments to our tariff which will (A) embargo the delivering to SACAL of consolidated containers which under the Agreement must be stripped and reloaded at the pier and (B) provide that where the $250 penalty is paid by SACAL that charge will be assessed against the shipper in addition to the otherwise applicable freight rate and charges.

Although SACL had no assurance that the Commission would grant special permission, it was at least incumbent upon them to attempt a tariff amendment.

Secondly, SACL lacked the requisite grounds for justifying an embargo. It admittedly suffered from no physical disability since the ILA had not sought enforcement of Clause 19, and SACL was not required to unload and reload (strip and stuff) any containers.[14/] Thus, there was no congestion at the pier which SACL argues as a ground for its embargo. Furthermore, the embargo would have been of questionable validity even assuming that the Union had sought enforcement of the clause, if the carrier could avoid any congestion by paying liquidated damages.[15/]

Petitioner next argues that its embargo is justifed because the "act" of stripping and stuffing would put it in violation of its tariff under section 2, Intercoastal Shipping Act, since, it asserts, it would thereby be providing

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14/ Most of petitioner's arguments are based on the premise that the ILA had sought enforcement of Clause 19, which the record discloses was not the case.

15/ As the Commission noted, in citing its precedent, financial loss to the carrier such as the requirement that the carrier pay liquidated damages is not a valid ground to impose an embargo. (J.A. 5).

a service not set out in its tariff.[16/] Petitioner's point here seems to be that it is justified in refusing to strip and stuff because its tariff does not specifically provide for this service.

In the first place, the point is premature since the ILA has not sought to enforce Clause 19 and so the petitioner has never been called upon to strip and stuff or pay liquidated damages for failure to do so. In any event petitioner's argument is a perversion of the purpose of section 2. The provision requiring the tariff to "state separately each terminal or other charge, privilege of facility," is designed to protect shippers against unfair treatment. Matson Navigation Co. - Container Freight Rates, 7 F.M.C. 480 (1963). It is not designed to allow a carrier to avoid a tariff obligation because the particular service is not separately stated.

If the carrier is required to provide additional services not separately stated, it must amend its tariff in order to pass on to the shipper the charge for such services. Otherwise, it must absorb the cost of such services provided that the absorption would not be discriminatory or give an undue advantage. Here SACL held itself out to carry for all shippers of containers. It did not distinguish between NVO and other shippers. It was thus its duty to carry all containers tendered to it charging only for the services provided for in its tariff. The fact that it may have had to strip and stuff or pay liquidated damages to the carrier does not alter its obligation to carry. For, as the Commission noted, until SACL alters "the terms and conditions under which it will hold itself out to transport NVO trailers, it . . . must accept and carry all [such] cargo tendered to it . . . ." (J.A. 6).

16/ Petitioner here appears to be misusing the term "embargo." The term as noted above (p. 9, supra), refers to a carrier's exculpation from a duty required by its tariff. Petitioner's argument here assumes that its tariff does not require it to strip and stuff as part of its obligations to carry containerized cargo.

Since not provided for in its tariff, SACL would have had to absorb the costs of stripping and stuffing until a valid amendment became effective. The absorption would not, as the Commission found, have provided any undue advantage nor would it have been discriminatory since all shippers, NVO and otherwise, were paying the same rates.

The same faulty premise recurs in petitioner's argument that the Commission's ruling results in a violation of the Labor Management Relations Act. (Pet. Br. p. 18). The Commission's order that petitioner adhere to its tariff, it argues, requires it to act contrary to the collective bargaining agreement by forcing it to load these trailers without stripping and stuffing the contents. The fallacy here again lies in petitioner's assumption that its existing tariff does not require it to perform the terminal services incidental to the loading of the container onto the vessel, including stripping and stuffing, if necessary. In any case, as we have noted earlier, petitioner's assertion is premature, for the ILA has not sought to enforce Clause 19.

A slight variation of the same theme is petitioner's assertion that the Commission has improperly compelled it to provide a service not set forth in its tariff. (Pet. Br. p. 31). The short answer is that the Commission is merely enforcing adherence to petitioner's existing tariff which requires the service at least until a valid amendment becomes effective. Embargo on Cargo, North Atlantic and Gulf Ports, 2 U.S.M.C. 464 (1940).[17/]

17/ Petitioner's reliance on McCormack S.S. Co. v. U.S., 16 F.Supp. 45 (N.D. Calif. 1936) is misplaced. That was a case in which an attempt was made to compel service after the effective date of a valid tariff amendment. See, Intercoastal Rates to and From Berkeley and Emeryville, California, 1 U.S.S.B. 510 (1935).

CONCLUSION

For the foregoing reasons, the Commission's decision here under review should be affirmed.

Respectfully submitted,

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IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23,118

SOUTH ATLANTIC & CARIBBEAN LINE, INC.,

Petitioner

v.

FEDERAL MARITIME COMMISSION AND THE
UNITED STATES OF AMERICA,

Respondents

REPLY BRIEF FOR PETITIONER

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CASE LAW

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REPLY BRIEF FOR PETITIONER

Respondents Federal Maritime Commission and the United States of America (Respondents) and Intervenors Transconex, Inc., and United Freightways Corporation (Intervenors) do not take into account that the high duties of a common carrier by water they describe *run equally to all users* of Petitioner's common carrier service. Here, if Petitioner accepted for transportation certain traffic, *i.e.*, trailers containing the traffic of NVO's, themselves common carriers by water, Petitioner would be required by the provisions of the Collective Bargaining Agreement to strip (unload) and stuff (reload) the

contents of those trailers at the marine terminal before loading them aboard Petitioner's vessel. This act of stripping and stuffing the trailers at Petitioner's already overtaxed terminal (no other terminals being available) would result in congestion at the terminal which would intolerably interfere with Petitioner's ability to provide service to all users.[1] Put another way, the terminal facilities available to Petitioner simply are not adequate to strip and stuff trailers containing the NVO traffic while continuing to meet Petitioner's obligations to the public generally as a common carrier by water. As noted in Intervenors brief at page 8, the case of *Railway Employees v. Florida ECR Co.*, 384 U.S. 238; 16 L.ed 2d 501 (1966) stated:

> ". . . the duty runs not to shippers alone but to the public. In our complex society, metropolitan areas in particular might suffer a calamity if rail service for freight or for passengers were stopped. Food and other critical supplies might be dangerously curtailed; vital services might be impaired; whole metropolitan communities might be paralyzed."

In embargoing that traffic which creates the congestion, Petitioner is acting in the interest of its users generally. Compare *Boston Wool Trade Association v. Merchants and Miners Transportation Co.*, 1 U.S.S.B. 32,[2] where the carrier lawfully embargoed traffic moving in congested carload volumes in order to continue uninterrupted service to traffic moving in less than carload volumes.

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[1]The affidavit of Petitioner's Vice President and General Manager (JA 69, 70, 71) shows that Petitioner's vessel carries a total of 60 trailers inward and 60 outward, *i.e.*, a total of 120 trailers to be handled at the terminal. In addition, Petitioner's vessel carries a substantial quantity of "break-bulk" cargo, *i.e.*, cargo which moves through Petitioner's terminal in the original packaging, not in trailers. The NVO traffic (p. 6) averages 15 trailers per sailing, sometimes up to 20.

[2]Cited by Respondents and Intervenors.

It is relevant to add that Intervenors are themselves common carriers by water; and that the purpose of Clause 19 of the Collective Bargaining Agreement is to "protect and preserve the work jurisdiction" of waterfront workers as to cargo carried by those common carriers by water. If, in their judgment, that trespassed any right of the NVO's, they have available to them the remedies of the National Labor Relations Board.[3] On the other hand, the public generally, including the majority of Petitioner's users, have no such remedy available to them; they have only Petitioner's responsibility as a common carrier by water. In Petitioner's judgment it would breach that duty to limit or interrupt Petitioner's service to the public as a whole in order to extend this extraordinary terminal service to the trailers of the few; and it would be particularly outrageous to pass on to the public at large the hidden cost of providing to these few a service not performed for other trailerload shippers under the same rate and rule, and a service not provided in Petitioner's tariff as Respondent (Brief, p. 12/14) says Petitioner must do.

Clause 19 of the Collective Bargaining Agreement was in full force and effect at all relevant times.

Respondents and Intervenors allege that at the relevant times the requirements of Clause 19 of the Collective Bargaining Agreement to strip and stuff the relevant trailers was not in force and effect. Thus, it is argued (Respondents' Brief, p. 6, 11 and 14) that no congestion could result from stripping and stuffing trailers containing NVO traffic at Petitioner's limited terminal facilities because "the ILA had not sought enforcement of Clause 19"; and (Intervenors' Brief, p. 5) that "the ILA had not enforced the containerization clause and had not insisted that containers tendered by Inter-

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[3]And if it does not trespass any right, they themselves as common carriers have the duty to come to terms with the ILA.

venors and other NVO's be unloaded and reloaded at SACAL's terminal facilities" and that, therefore, Petitioner's embargo was unlawful.

The fact is that on February 19, 1969, the waterfront employers at Miami, including Petitioner's independent stevedoring contractor, on the one hand and the International Longshoremen's Association (ILA) as the collective bargaining agent for longshoremen at that port on the other entered into an agreement that the NVO trailers would be stripped and stuffed at the dock before the containers were loaded to the ship and that in the event of a breach, *i.e.*, in the event of such containers being loaded to the ship without the contents first being shipped and stuffed at the dock, liquidated damages would be assessed and paid for that breach (JA 66, 67). That Agreement contains no conditions precedent to performance; there is no requirement that the ILA "insist upon" or otherwise "enforce" performance; and no other provision defers or qualifies the effectiveness of the undertaking to strip and stuff the trailers. No further action was required; it was then and there necessary, in conformance with the contract, to strip and stuff the relevant trailers before loading them aboard ships. Indeed the record is that the Petitioner's General Manager sought *without success* to obtain a statement from the ILA deferring the effectiveness of Clause 19 (JA 58, 59; 73, 74).

There was then, at all material times, an obligation pursuant to that agreement for Petitioner's independent stevedoring contractor to strip and stuff these trailers; and a right on the part of the ILA that those trailers be stripped and stuffed. The clear obligation of Petitioner's independent stevedoring contractor (and therefore of Petitioner) was not to breach, but to observe this lawful contract by stripping and stuffing the trailers at the terminal before loading to Petitioner's ships.

Petitioner's embargo rested, then, upon the fact that by the terms of a lawful[4] Collective Bargaining Agreement the relevant trailers could not be loaded to its ships unless those trailers were first stripped and stuffed at the marine terminal; and that stripping and stuffing the trailers at that terminal would create congestion that would restrict Petitioner's ability to provide, and would interrupt, service to the public at large, including the majority of Petitioner's users.

The record is uncontradicted that Petitioner's facilities are inadequate to handle the normal flow of other traffic *and* strip and stuff the relevant trailers; and that added space is not available (JA 69-73). Petitioner's adversary, Transconex says (JA 25, 26):

> ". . . To begin with, SACAL is not equipped to handle LTL freight. SACAL does not have the terminal facilities to consolidate at its premises small shipments into trailerloads. . . ."

See also Intervenors Brief at p. 5/6:

> ". . . On the other hand, if the ILA should insist upon the unloading and reloading of NVO containers, the facilities of SACAL would be inadequate. . . ."

The Commission itself (JA 3) said:

> ". . . In other words, congestion is not a problem unless the ILA insists upon unloading and reloading the trailers. . . ."

Thus, the record is uncontradicted that the obligation of the Collective Bargaining Agreement to strip and stuff these containers was in force; that nothing in the agreement or elsewhere deferred

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[4]Neither at that time, nor at any time since, has anyone challenged the lawfulness of the February 19 Agreement before the National Labor Relations Board.

the effectiveness of the agreement; that the consequence of that stripping and stuffing at Petitioner's terminal would be congestion. There is complete agreement that congestion would result from stripping and stuffing the trailers and that an embargo to avoid congestion is lawful. The Commission's order at issue therefore is unlawful.

The Commission did not hold that Petitioner was obliged by their tariff to strip and stuff.

Respondents argue (Brief, p. 14) that Petitioner was obliged by its tariff "to perform the terminal service incidental to the loading of the container onto the vessel, including stripping and stuffing, if necessary." See also Respondent's Brief, p. 7.

Intervenors (Brief, p. 14) differ. They say:

> "There was no provision in the then existing tariff of SACAL which required that the cargo which might fall within the definition of Clause 19 be stripped and stuffed. If SACAL wanted to impose this uneconomic and wasteful burden upon this type of traffic, then it should have proceeded by way of an amendment to its tariff and not by the declaration of an unlawful embargo: . . . ."

We are puzzled by Respondents' contradictory positions. The proximate cause of Petitioner's embargo is the congestion that would result at its terminal from the act of stripping and stuffing the relevant trailers. As just noted, there is agreement that congestion would result from that act, and that congestion is a lawful ground for embargo. Whether the stripping and stuffing is required by the Collective Bargaining Agreement, or by Petitioner's tariff, or by both, is immaterial. The result in either or both cases is congestion. Petitioner, then, would gladly embrace Respondents' position and urge this court that the stripping and stuffing was necessary not only by

reason of the Collective Bargaining Agreement, but also by the provisions of Petitioner's published tariff. However, Petitioner does not do so because the fact is that the Federal Maritime Commission did not hold that Petitioner's published tariff authorized or compelled Petitioner to perform the terminal service of stripping and stuffing these trailers. The Commission described the full measure of Petitioner's holding out in their Report (JA 1) as follows:

> ". . . As required by section 2 of the Intercoastal Act, SACL files its rates, fares, and charges for (their) service with the Commission. These tariffs provide a so-called freight-all-kinds (FAK) rate. Under this rate, SACL spots an empty highway trailer (also known as a container) at a shipper's premises within the limits of greater Miami. *After the* shipper loads the trailer SACL picks it up and hauls it to the marine terminal for loading aboard a vessel for carriage to San Juan. . . ." (Emphasis added)

As the Commission relates, the trailer is loaded by the shipper; at no place does Petitioner hold itself out by its tariff to load trailers spotted at the shipper's terminal for loading; to unload those trailers or to unload and reload (strip and stuff) them.

What the Commission did hold (Petitioner's Brief, p. 20/24) was that Petitioner must carry trailers containing NVO traffic *without stripping and stuffing*, in breach of and in defiance of Clause 19 of the Collective Bargaining Agreement. Compare, for example, Report (JA 11) at p. 4:

> "SACL, by its own admission, is under no existing physical disability to carry the cargo in question. . . ."

with the alleged "admission" (Tr. 31[5])

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[5]See also p. 92/93.

> "Chairman Harlee: All right, is the congestion such that you could not handle the NVO trailers even if the ILA agreed to handle them without unloading and reloading? (Counsel for Petitioner): . . . Not at all. That is not our point at all. If we can move these trailers through without having to rehandle the cargo, we welcome it."

By a telegraphic Motion to Clarify the Order to Show Cause (JA 77) by Response to the Show Cause Order (JA 35, 36); in oral argument to the Commission (Tr. 9/13; 93); and by Petition to Reopen for Clarification (JA 79) Petitioner presented as an issue that the terminal service for stripping and stuffing the trailers was not provided in its tariff; that nothing in its tariff authorized or compelled Petitioner to perform the service. If, in fact, then, the Commission's Report means to hold that Petitioner's rate includes the terminal service of stripping and stuffing the trailer and that Petitioner is obliged by its tariff to perform that service, the Report falls short of the requirement of Section 8(b) of the Administrative Procedure Act that decisions include:

> "a statement of (1) findings and conclusions, *as well as the reasons or basis therefore,* upon all the material issues of fact, law, or discretion presented on the record; . . . ." (Emphasis added)

We respectfully submit then that Respondents' present contention that the SACAL rate included the terminal service of stripping and stuffing is an argument (and a poorly thought-out one, at that) advanced to buttress the Commission's Report, not a holding of the Commission, and should therefore be ignored.

The requirements of Section 2, Intercoastal Shipping Act, 1933.[6]

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[6] 46 U.S.C. 844.

Respondents argue (Brief, p. 13) as follows:

> "If the carrier is required to provide additional services not separately stated, it must amend its tariff in order to pass on to the shipper the charge for such service. Otherwise, it must absorb the cost of such services provided that the absorption would not be discriminatory or given undue advantage. . . ."[7]

But that simply isn't what Section 2 of the Intercoastal Act says, and, indeed, is in direct conflict. Section 2 says, first, that the carriers' tariff publication shall:

> ". . . state separately each terminal or other charge, privilege, or facility, granted or allowed. . . ."

Next, it says that the carrier shall not:

> ". . . extend or deny to any person any privilege or facility, *except in accordance with such schedules.*" (Emphasis added)

The Commission's predecessor precisely held that it is just as much a violation of section 2, subject to just as heavy a penalty, to perform a service not provided in the carriers' tariff as it is to impose a rate or charge other than that published in the tariff. See *Intercoastal Investigation,* 1935, 1 U.S.S.B. 400, 447 (Petitioner's Opening Brief, p. 29/30).

The Role of the Federal Maritime Commission.

Intervenors allege (Brief, p. 15) that Petitioner "in effect" wants the Federal Maritime Commission "to determine the validity of

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[7]Petitioner maintains, *supra,* that it is indeed discriminatory, but absorption to charge users generally the hidden cost of performing extraordinary services, not provided in the tariff.

Clause 19." That is not a correct statement. The Federal Maritime Commission has no more business saying that Clause 19 of this Collective Bargaining Agreement is lawful than they have treating it as unlawful and of no effect by ordering Petitioner to breach it and carry the relevant traffic without stripping and stuffing. Petitioner's position is that the Federal Maritime Commission has no businesss intermeddling with Clause 19 at all, but should leave the slate clean for the national policy of the Labor Management Relations Act and the expertise of the National Labor Relations Board. Once they determine that there is indeed a Clause 19, and that the act of stripping and stuffing these trailers will or will not cause congestion to warrant the embargo, the Federal Maritime Commission has discharged their responsibilities under the shipping acts. Like the rest of this land they must leave to the National Labor Relations Board any question of whether Clause 19 is lawful or unlawful, or whether it unlawfully interferes with commerce, and therefore should be set aside.

Special Permission Applications.

Respondents and Intervenors allege that the way was open to Petitioner to do something under the Commission's special permission procedures. However, the Commission said (JA 3, 5):

> "The only question presented is whether SACL's 'Embargo Notice' imposed a true embargo. If it did the filing and notice requirements of Section 2 of the Intercoastal Act do not apply and the notice is valid."

Thus, no special permission is required for an embargo; the requirements of section 2 do not apply.

Their contention specifically is that Petitioner could have sought special permission to publish a charge for performing the stripping and stuffing. But once again, we must point out that the cause of the embargo is the congestion that results from stripping and stuffing; that congestion is the same whether or not Petitioner is paid for performing the service. In any event, it is appropriate to note (1) that Petitioner's ship sails from Miami every sixth day; and (2) the Commission's unpublished rules relating to special permission applications require service of the application upon interested persons, and therefore gives them the right to be heard. In the circumstance, it is pretense to say that the special permission procedures were apt, or could afford a timely remedy.

Respectfully submitted,

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Dated: October 30, 1969